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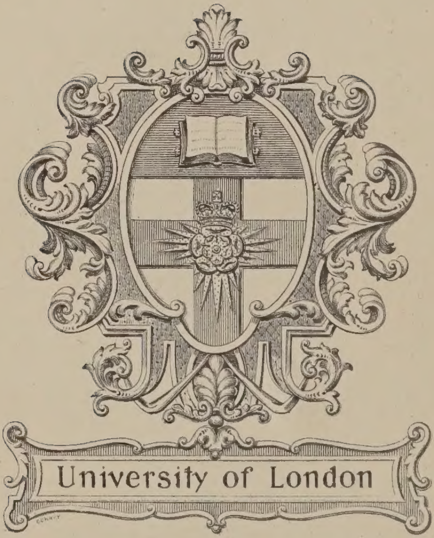

University of London

1945

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

CHANCERY DIVISION

AND CASES IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

◆

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
LONDON, E.C.4.

BIBL. LONDIN UNIV.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1945, is as follows:—

In the First Series,
[1945] Ch.
In the Second Series,
[1945] K. B. [1945] P.
In the Third Series,
[1945] A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BERKELEY (EARL), DECD.

BORRER *v.* BERKELEY.

C. A.
1944
Oct. 16.
Lord Greene M.R., Finlay and Morton L.JJ.

Appeal—Court of Appeal—Decision of High Court based on previous case—Subsequent decision of Court of Appeal over-ruling that case—Leave to appeal out of time.

On an originating summons to determine whether a tax-free annuity bequeathed by the testator was taken out of s. 25, sub-s. 1, of the Finance Act, 1941, by a confirmatory codicil, Cohen J. held that he was bound by the decision of Simonds J. in *In re Tredgold* [1943] Ch. 69, to decide that it was taken out of the Act and was payable in full. There was no appeal from Cohen J.'s decision within the time allowed by the Rules of the Supreme Court. Subsequently, in *In re Sebag-Montefiore* [1944] Ch. 331, the Court of Appeal over-ruled *In re Tredgold* (supra) and two other beneficiaries of the testator applied for leave to appeal from Cohen J. notwithstanding that the appeal was out of time :—

Held, that, while the fact that a superior court had over-ruled a decision on which a subsequent judgment was based was not by itself a sufficient ground for giving leave to appeal out of time, the court would take into account all the circumstances of the case and would grant leave if it appeared just to do so, and in the present case leave ought to be granted.

In re J. Wigfull & Sons' Trade Marks [1919] 1 Ch. 52, considered.

ORIGINAL MOTION.

By a codicil, dated December 3, 1938, to his will, dated November 10, 1936, the Earl of Berkeley gave to his wife an annuity of 5,000*l*. free of income tax and surtax, to be paid in priority to all other annuities and legacies, and by a subsequent codicil, dated September 14, 1940, he confirmed that annuity. The testator died on January 15, 1942. The plaintiff, who, with Lady Berkeley, was trustee of the testator's estate, took out an originating summons for the determination, inter alia, of the question whether s. 25, sub-s. 1, of the Finance Act, 1941, which scales down tax-free payments under instruments made before September 3, 1939, applied to Lady Berkeley's annuity, or whether the confirmatory codicil of September, 1940, had the effect of excluding the provisions of that section. On May 19, 1943, Cohen J. held that he was bound by the decision of Simonds J. in *In re Tredgold* (1) to hold that the section was excluded by the confirmatory codicil made after September 3, 1939, and that Lady Berkeley's annuity was payable in full. No appeal was lodged against that decision within the prescribed time. Subsequently, the Court of Appeal, in *In re Sebag-Montefiore* (2), overruled *In re Tredgold* (1), and two defendants to the summons (other than Lady Berkeley), who had life interests in residue, by the present motion asked for leave to appeal from the order of Cohen J. notwithstanding the time had expired. It was stated that, if the section were excluded, the provision of Lady Berkeley's annuity would, or might, exhaust the whole corpus of the estate. There were a number of successive life interests, but no person as yet born, other than the trustees, was entitled to the corpus.

J. H. Stamp for the life tenant in possession. Before 1909 the court could only grant leave to appeal out of time on "special" grounds. Now R. S. C., Or. 58, r. 15, is expressly made subject to the general discretion of the court under Or. 64, r. 7. It is true that a subsequent decision of a superior court is not of itself necessarily a ground for granting leave: *In re J. Wigfull & Sons' Trade Marks* (3); but the court will grant leave if other circumstances make it just, and especially where there is a fund awaiting distribution. [He referred to *Gatti* v. *Shoosmith* (4)].

J. V. Nesbitt, for an infant life tenant in remainder, adopted the argument in support of the motion.

Harman K.C. and *Wilfrid Hunt* for Lady Berkeley. This is a

(1) [1943] Ch. 69.
(2) [1944] Ch. 331.
(3) [1919] 1 Ch. 52.
(4) [1939] Ch. 841.

C. A.

1944

BERKELEY, DECD., *In re*.

BORRER *v.* BERKELEY.

matter of principle—interest reipublicæ ut sit finis litium—which should not be departed from to suit particular facts. If this can be done, there will be nothing to prevent further applications if the House of Lords should, in some future case, say that *In re Sebag-Montefiore* (1) is wrong. Persons will be interested in this estate in the future who cannot be before the court and will not be bound by the judgment. There is another reason why this annuity is not within s. 25, sub-s. 1, of the Finance Act, 1941, namely, that it is not of a stated amount, but of such an amount as may be necessary to give Lady Berkeley 5,000*l*. nett. That was mentioned, but not argued, before Cohen J., as he considered himself bound on the other point, so the appeal would not necessarily succeed if leave were granted.

Eardley-Wilmot for the plaintiff.

Hewins for another annuitant.

LORD GREENE M.R. [after stating the facts]: We have not gone in detail into the relevant testamentary dispositions, but we are told (and this is not disputed) that after the present tenant for life in possession there are other tenants for life in remainder in succession, at least one of whom was not a party to the proceedings below, and, accordingly, is not bound by them. There may be, in addition, remaindermen interested in capital who are not yet in existence, but who may hereafter be born. They, too, are not bound by this order of Cohen J. It is correctly pointed out by Mr. Stamp that a tenant for life in remainder who is not a party to the proceedings could to-morrow issue an originating summons and ask for a decision contrary to that of Cohen J., and the judge before whom such a summons came would be bound by the decision of this court in *In re Sebag-Montefiore* (1), to come to a different conclusion from that embodied in Cohen J.'s order.

We have to decide whether, in those circumstances, we ought to exercise the discretion, which unquestionably we have, to allow an appeal to be presented out of time. It is argued by Mr. Harman that our discretion ought not to be exercised in circumstances such as these. He maintains that the only relevant circumstance which can be put forward in favour of the application is the fact that this court in *In re Sebag-Montefiore* (1) overruled *In re Tredgold* (2). He relies on the

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(1) [1944] Ch. 331.

(2) [1943] Ch. 69.

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decision of this court in *In re J. Wigfull & Sons' Trade Marks* (1) and argues, on the basis of that decision, that it is not sufficient merely to state that the law has been differently laid down by a superior court in a subsequent case. In the case cited Swinfen Eady M.R. said (2): "In my judgment, where an application "is made to enlarge the time for appeal, there must be some "proper grounds for supporting it. It is not enough to say "the time has expired; it expired more than two years ago, "and therefore I cannot appeal without the time being "enlarged; because it has expired, therefore I ask that it "may be enlarged. That alone is no ground. In my "judgment also, it is not necessarily a ground for enlarging "the time that in some subsequent case a different view is "taken of the construction of an Act of Parliament." The decision that the learned Master of the Rolls ultimately comes to on this point is (3): "In my opinion the court has power to "enlarge the time for appealing if it is just that, under the "circumstances, an order enlarging the time should be made."

I find no difficulty in reconciling the statement that the different decision is not necessarily a ground for enlarging the time with the statement that the court can enlarge the time if it is just in the circumstances to do so. It seems to me that the principle to be extracted is that it is not sufficient for a party to come to the court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The court will say to him: "That bald statement is not enough. What are the "facts? What is the nature of the judgment? Who are the "parties affected? What, if anything, has been done under "it?" and so forth. In other words, the whole of the circumstances must be looked at. If the court, in the light of those circumstances, considers it just to extend the time, then it will do so. That seems to me to be the proper principle, and it is entirely in accordance with the view taken by this court in the most recent case under this rule—*Gatti* v. *Shoosmith* (4).

Taking all the circumstances of the present case into consideration—namely, the fact that the rights of parties not before Cohen J. are unaffected by his order, the fact that beyond mere payment down to date nothing has been done, the fact that no inquiries have been pursued, the circumstance that this court has declared the law to be different from what it was thought

(1) [1919] 1 Ch. 52.
(2) Ibid. 58.
(3) Ibid. 59.
(4) [1939] Ch. 841.

to be—the case appears to be clearly one where, in the interests of justice, leave ought to be given.

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FINLAY L.J. I agree.

MORTON L.J. I agree.

Leave to appeal granted.

Solicitors: *Garrard, Wolfe & Co.; Field, Roscoe & Co.; Boodle, Hatfield & Co.; Culross & Co.*

J. W. H.

In re COHN.

UTHWATT J.
1944
June 8, 27.

Conflict of laws—Domicile—Will—Survivorship—Death of two German nationals, domiciled in Germany, in air raid in London—Devolution of movable property—German Civil Code—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.

A mother and a daughter, who were German nationals and at all times domiciled in Germany, were killed in an air raid in London as a result of the same explosion, and it could not be proved which of them had survived the other. The daughter was entitled to movable property under her mother's will, if she survived her mother:—

Held, that, as the question of survivorship depended on the provision of the German Civil Code under which the deaths were presumed to have taken place simultaneously, she was not a person living at the time when the succession to her mother's estate opened, and was, therefore, not entitled to the property.

ADJOURNED SUMMONS.

Mrs. Hedwig Cohn, her late husband, Max Cohn, and their daughter, Mrs. Gerda Oppenheimer, were German nationals and at all material times were domiciled in Germany. By a joint will made on April 10, 1918, in the German language, in Germany, Mrs. Cohn and her husband (who predeceased her) appointed each other their heirs and declared that "after "the death of the survivor of us the entire estate shall pass "in equal shares to our children," Mrs. Oppenheimer, Mrs. Else Freudenthal and Siegfried Cohn. On October 14, 1940, Mrs. Cohn and Mrs. Oppenheimer were killed in London in an air raid as the result of the same explosion. On June 5, 1942, letters of administration with a translation of the will were granted to the Public Trustee. The Public Trustee took out a summons to ascertain (inter alia) whether the succession to the movable property of Mrs. Cohn was to be determined according to English or German law.

Donald H. Cohen for the Public Trustee.
Danckwerts for the Custodian of Enemy Property.
Lightman and *Fawell* for other parties interested.

Cur. adv. vult.

June 27. UTHWATT J. read a judgment, in which he said: On the evidence I find as a fact that the circumstances in which Mrs. Cohn and Mrs. Oppenheimer were killed were such that it is uncertain and cannot be proved which of them survived the other. The order of these deaths is, and always will be, uncertain. The question arises whether or not Mrs. Cohn's movable property is to be administered on the footing that Mrs. Oppenheimer survived Mrs. Cohn.

There is a difference between the law of England and the law of Germany regarding the presumption which is to be made about the order of the deaths in the circumstances stated. The law of England, by s. 184 of the Law of Property Act, 1925, prescribes that, where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others " such deaths shall (subject to " any order of the court), for all purposes affecting the title " to the property, be presumed to have occurred in order of " seniority, and accordingly the younger shall be deemed to " have survived the elder." The Civil Code of Germany makes different provision. In the first book of the German Civil Code, headed " General Principles," the first chapter of the first part deals with " Natural Persons." Article 20 contained in that chapter provides that, if several persons perish in a common danger, it is presumed that they have died simultaneously. On July 4, 1939, this was replaced by the following article :—" If it cannot be proved that of several " deceased persons or persons declared dead one has survived " the other, it is presumed that they have died simultaneously." It may be observed in passing that the date of the widening of the scope of art. 20 effected by the amendment is of interest to the general historian. Under German law Mrs. Oppenheimer can benefit under the will of Mrs. Cohn only if she (Mrs. Oppenheimer) was the survivor of the two.

It was argued by Mr. Danckwerts, on behalf of those interested in Mrs. Oppenheimer's estate, that the first question which the court was called on to ascertain was whether or not Mrs. Oppenheimer survived Mrs. Cohn; that, in ascertaining that fact, the method of proof was determined by the lex fori (the law of England)—a general proposition which cannot be disputed; and that, when once it was shown that it was uncertain which of them survived the other, s. 184 of the Law of Property Act, 1925, came into operation as part of the lex fori compelling the court to draw the inference or proceed on the footing that Mrs. Oppenheimer survived Mrs. Cohn. It was, according to his argument, only after reaching that point, that one turned to the law of the domicile.

In my opinion, this argument is not well founded. The law of the domicile, namely the law of Germany, is alone relevant in determining the effect of the testamentary dispositions of movables made by Mrs. Cohn, the basis on which the movables are to be administered, and the facts which it is necessary to ascertain to administer that estate. If, for instance, under the law of Germany, it was not necessary for the efficacy of the disposition in her favour that Mrs. Oppenheimer should survive Mrs. Cohn, but was only necessary that she should survive either Mr. or Mrs. Cohn, no inquiry as to survivorship such as is here being made would have been necessary. The question of survivorship is, in fact, opened up by the provisions of German law as to inheritance and is formally not: "Did "or did not Mrs. Oppenheimer survive Mrs. Cohn?" but "Is the administration of Mrs. Cohn's estate to proceed on "the footing that Mrs. Oppenheimer survived Mrs. Cohn or "on the footing that she did not?" The purpose to which the inquiry as to survivorship is directed must be kept in mind. The mode of proving any fact bearing on survivorship is determined by the lex fori. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there. Section 184 of the Law of Property Act, 1925, does not come into the picture at all. It is not part of the law of evidence of the lex fori, for the section is not directed to helping in the ascertainment of any fact but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where title is governed by the law of England. It has no application where title is determined by the law of any other country.

I turn now to consider the law of Germany in relation to the facts proved, unhampered by s. 184 of the Law of Property Act, 1925. In my view, the provision contained in the article of July 4, 1939, is part of the general substantive law of Germany and not part of its law of evidence. Its terms and the place in which the repealed article dealing with the same general subject-matter was to be found make that clear. That rule of law has to be applied, inter alia, as part of the Law of Inheritances, contained in the German Civil Code. Predicating of Mrs. Oppenheimer that she is presumed to have died simultaneously with Mrs. Cohn, it is clear that Mrs. Oppenheimer was not a person living at the time when the succession to Mrs. Cohn's estate opened, and that, accordingly, having regard to arts. 1922 and 1923 of the German Civil Code, the defendants, Mrs. Freudenthal and Siegfried Cohn, take Mrs. Cohn's movable estate.

Solicitors : *Rubinstein, Nash & Co. ; Broad & Son ; Solicitor to the Custodian of Enemy Property.*

J. L. D

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Oct. 16, 17.

Lord Greene M.R., Finlay and Morton L.JJ.

In re PALMER.

NATIONAL PROVINCIAL BANK *v.* BARWELL.

Will—Bequest of " stocks and shares . . . . in care, custody or possession" of bank—Mandate to pay interest to account of testatrix at bank—Order in Lunacy—Transfer of stocks into court—Failure of bequest.

A testatrix, who was the owner of two sums of stock inscribed in her name at the Bank of England, had given a mandate to the bank to pay the interest on the stocks to her account at Grindlay's Bank. By her will, made in 1939, she gave all stocks, shares and moneys which should " at her death be " standing in her name or at her disposal and be " in the care, custody or possession of " Grindlay's Bank " to her nephews living at her death. After the date of her will, an order was made under s. 116 of the Lunacy Act, 1890, appointing a receiver of her estate, and the stocks in question were ordered to be transferred into court where they were at her death :—

Held, that the stocks in question were not "in the care, custody "or possession of Grindlay's Bank" at her death and that the bequest to the nephews failed so far as regarded these stocks which fell into and passed under the residuary bequest.

Decision of Uthwatt J. ([1944] Ch. 374) affirmed.

Appeal from Uthwatt J. (1)

By cl. 4 of her will, dated September 14, 1939, the testatrix, Miss Frances Foster Palmer, made the following bequest: "I bequeath all such stocks shares money and things as shall "at my death be standing in my name or at my disposal and "be in the care custody or possession of Grindlay's Bank, Ld. "of Parliament Street, London, S.W.1 to such of my nephews "as shall be living at my death and if more than one of them "shall be so living as tenants in common in equal shares." The will also contained a bequest of the residuary estate. On March 6, 1941, an order was made under s. 116 of the Lunacy Act, 1890, appointing a receiver of the testatrix's estate on the ground that through age and mental infirmity she was unable to manage her affairs. Immediately before the date of that order the testatrix was the owner of 2,000*l.* 3½ per cent., conversion stock and 1,000*l.* 4 per cent. consolidated stock inscribed in her name. She had given a mandate to the Bank of England to pay all the interest on these stocks into her account at Grindlay's Bank, and this mandate had been acted on for some time. On the making of the order under the Lunacy Act the testatrix's will was brought to the attention of the master, and he, acting under the powers vested in him by the Lunacy Acts, 1890 and 1891, made certain orders to preserve, so far as possible, the administration of the property of the testatrix as regards the tenure and the devolution of her property, but no such order was made regarding the two stocks mentioned with a view to preserving any rights existing under cl. 4 of the will. The stocks were ordered to be transferred into court. The testatrix died on July 12, 1941, and her will was proved. A summons was taken out by the plaintiffs as trustees of the will asking whether on the true construction of cl. 4 of the will and in the events which had happened (*a*) the defendants, Alan Harold Barwell and Claude Foster Barwell, nephews of the testatrix, were entitled as tenants in common in equal sharing to the two stocks, or (*b*) the stocks formed part of the residuary estate of the testatrix. Uthwatt J. held that the stocks in question were "not in the care custody

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"or possession of Grindlay's Bank" at the material time, and that as the removal of the stocks was not of a temporary nature only, they passed under the residuary bequest. The two nephews appealed.

Fawell for the two nephews. This is not really a question of ademption: see *Sheffield* v. *Von Donop* (1). When there has been an actual conversion, there is no ademption, unless it has been made with full authority: *Taylor* v. *Taylor* (2); *In re Freer* (3). There has always been a rule not to vary or change the property of a lunatic beyond what is necessary for his maintenance: *Att.-Gen.* v. *Marquis of Ailesbury* (4); and rules have been made and discretions conferred for preserving the character of property notwithstanding its conversion by orders made in lunacy, first by the Lunacy Regulations Act, 1853, then to a wider extent by s. 123 of the Lunacy Act, 1890, and lastly by s. 2, sub-s. 8, of the Lunacy Act, 1922. All these statutory provisions show a strong tendency to ensure that a testator's bequests should not be affected by any dealings with his property in lunacy, but, apart from this, the bequest of the two sums of stock remains valid by anology with cases relating to bequests of furniture. There are many authorities to show that, where a bequest has been made of furniture or chattels in a particular house, articles removed for security or cleaning purposes during the testator's lifetime continue to pass under the bequest. *In re Wood* (5) is directly in point here and other authorities are *Chapman* v. *Hart* (6), *Lord Brooke* v. *Earl of Warwick* (7), *Rawlinson* v. *Rawlinson* (8), *In re Johnston* (9) and *In re Lea* (10). In the present case the transfer of the stocks into court was no act done by the volition of the testatrix and it ought not to affect the bequest to the two nephews.

G. D. Johnston for some of the residuary legatees. The bequest in question was made by description and what passed at the death of the testatrix is what then satisfied that description. It can make no difference that the two sums of stock ceased to be in the care or custody of Grindlay's Bank as the result of an order in lunacy. The fact remains that they were

(1) (1848) 7 Hare 42.
(2) (1853) 10 Hare 475.
(3) (1882) 22 Ch. D. 622.
(4) (1887) 12 App. Cas. 672, 688.
(5) [1894] 2 Ch. 577.
(6) (1749) 1 Ves. Sen. 271.
(7) (1848) 2 De G. & Sm. 245.
(8) (1876) 3 Ch. D. 302.
(9) (1884) 26 Ch. D. 538.
(10) (1911) 104 L. T. 253.

not in the care or custody of the Bank at the testatrix's death. The furniture cases have no application. They turn on the fact that the furniture after removal continued to belong to the particular house. It is like a matter of domicil. The master in lunacy could have given the stocks the character of being at the bank by an order under s. 2, sub-s. 8, of the Lunacy Act, 1922, as he did in regard to two sums of cash, but he failed to do so. In *In re Wood* (1), on which special reliance has been placed, no reasons were given for the decision.

Myles for an infant residuary legatee. Any transfer of the two sums of stock by the testatrix would have taken them out of the bequest to the two nephews. It can make no difference that the order of transfer was made in lunacy. The gift, it must be remembered, is of articles in a particular custody at the testatrix's death, and, although the act of removal was the act of the master in lunacy, it must be given its natural effect in the absence of any order under s. 123 of the Lunacy Act, 1890: *In re Walker* (2); see also *In re Freer* (3). The cases relating to removal of pieces of furniture all relate to temporary removals, but here the order of the master in lunacy made a permanent removal.

Fawell replied.

LORD GREENE M.R. The question we have to deal with arises in connexion with two out of three sums of stock the income of which Grindlay's Bank was collecting. These two sums of stock have been dealt with on the footing that, but for the order directing their lodgment in court, they, as well as the third sum of stock not ordered to be transferred, would have been properly described as being "in the care custody or "possession of Grindlay's Bank" at the date of the death. Uthwatt J. has held that, those two sums of stock having during the life of the testatrix been put into the name of the Accountant-General, the only connexion with Grindlay's Bank was severed so that they could not be said to be "in the care custody or possession of Grindlay's Bank" at the time of the testatrix's death. It is argued that that decision was wrong.

I propose to assume that, but for the lodgment and if the stock had remained subject to the directions of the testatrix, it would have fallen within the language of the bequest. The only question I propose to discuss—the only question which has been argued before us—is whether, on that basis, the lodgment under the order has had the effect of taking these stocks out of a description which otherwise they would have satisfied.

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(1) [1894] 2 Ch. 577.
(2) [1921] 2 Ch. 63.
(3) 22 Ch. D. 622.

It cannot be disputed that, at the death of the testatrix it was imposible to say that those two holdings were "in the "care custody or possession of Grindlay's Bank." If the testatrix had not become of unsound mind and had herself severed the only connexion with Grindlay's Bank by revoking the dividend mandate in their favour and signing another dividend mandate in favour of another bank, it could not be disputed that, if she had then died, the holdings would not have been then "in the care custody or possession of Grindlay's "Bank." The question, therefore, is whether the circumstance that the connexion with Grindlay's Bank was severed as a result of the order in lunacy makes any difference to the position as it would have been if the connexion had been severed by the voluntary act of the testatrix herself.

It is said as a general proposition (and I do not in the least wish to dispute it) that, in the administration of the estates of lunatics, the court will always be careful not to disturb the actual condition in which the estate of the lunatic is found more than is necessary for the care of the lunatic and the due administration of the lunatic's estate. Apart from statute, however, the proper principle to apply appears to me to be that acts done pursuant to, or as a consequence of, any order in lunacy are as effective as, and produce precisely the same results as, acts done by the lunatic himself save in so far as a statute may otherwise provide or save in so far as, under some statutory discretion, a different provision may be made by the judge in lunacy or the master on his behalf.

There are three statutory provisions under the Lunacy Acts by which the legislature has laid down certain rules and given certain discretions which, in the cases where they operate, have the effect of preventing an order or act in lunacy from having what would otherwise be its normal result. None of those provisions applies in the present case, and, accordingly, no comfort can be obtained from them by the two nephews. The position with regard to statutory provisions of that kind is, I think, made clear in a decision of Russell J. in *In re Walker* (1), the effect of which is that, apart from statutory provisions which modify what would otherwise be the result of an order in lunacy, the order has its natural prima facie effect even though it alters the rights, or disappoints the hopes, of persons interested, or likely to be interested, in the lunatic's estate. The section which Russell J. had to deal with was s. 123 of the Lunacy Act, 1890. Section 2, sub-s. 8, of the Lunacy Act, 1922, is in the following terms: " Amongst the " powers which by virtue of s. 27 of the Lunacy Act, 1891, " may be exercised by the master there shall be included the " power of making orders for the purpose of preserving so far " as possible in the administration of the property of the lunatic " the quality, tenure and devolution of the property." In the present case, the master had that power in mind because, with regard to two sums of cash standing in the accounts at Grindlay's Bank, he made a special direction that " for the purpose " of preserving so far as possible in the administration of the " property of the patient the quality and devolution " of the sums of cash which under the lodgment schedule were to be brought into court " the same are to be placed to a special " credit designated 'Moneys at Messrs. Grindlay & Co., Ld., " 'bankers.' " It is obvious that the master, in making that special order, desired, so far as he could, to preserve the position of those two sums of cash pursuant, as he conceived, to the powers given to him by s. 2, sub-s. 8, of the Act of 1922. He made no such order with respect to the two sums of stock. Therefore, this question falls to be considered without reference to any of the statutory provisions under the Lunacy Acts designed, putting it broadly, to preserve the status quo in relation to the lunatic's estate. It follows that the two nephews can only succeed on some principle of law, if any, which assists their case.

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(1) [1921] 2 Ch. 63.

The bequest is one the subject-matter of which can only be ascertained at the death of the testatrix. Strictly speaking, no case of ademption arises. At the death of the testatrix the situation of her property must be looked at and it must be asked what articles there are which satisfy the description of standing in her name or at her disposal " in the care custody or " possession of Grindlay's Bank." As I have said, the only link which could be said to satisfy those words had, at the date of her death, been severed. On no argument could this stock be said to be " in the care custody or possession of Grindlay's " Bank." Does the fact that that link was severed by reason of something done in lunacy justify us in saying we must treat it as though it had not been severed? I can find no principle in any of the cases, nor, indeed, any principle grounded in good sense, which would justify us in laying down any such proposition. It seems to me that the legislature, having indicated the cases in which the situation and nature of the property may be preserved, can only have done it on the assumption that, but for these special provisions, the ordinary law would apply.

I think it well to point out at this stage that, if it be true that s. 2, sub-s. 8, of the Act of 1922 empowers the master to make an order which would preserve the status quo in such a case as this, it is unfortunate if, by a mere oversight or by some misconstruction of the will of the lunatic, he has failed to do so. In so far as the master has power in this sort of case to make the appropriate order, he should be very careful to see what possible interests may stand to be affected.

In answering the first general proposition put before us, I feel constrained to say that the order of the master in lunacy in these circumstances has its natural prima facie effect and is not to be given some artificial interpretation.

Mr. Fawell then argued that his case could be put on a broader ground, and he called our attention to a number of authorities dealing with bequests of articles of property by reference to their situation at the time of the testator's death. The bequest of the contents of a house is a typical case. It has been held in a number of these cases that where articles the normal situation of which is in a particular house—articles which, so to speak, are normally domiciled there—are temporarily removed for some special purpose in circumstances which do not indicate any intention of permanent removal, those articles, for the purpose of a gift in a will, are to be treated as still remaining in the house. The fact that at the testator's death a piece of furniture has been sent away for repair or a picture has been sent away to be cleaned does not operate to take those articles out of the gift as a permanent removal would have done. Mr. Fawell argued that the present case should be treated as analogous to those cases because the order for lodgment in court was really made for the purposes of safe custody. As a matter of fact, we are told that orders, certainly in the case of inscribed stock, are made as of course, and it is probable that the order in this case was made almost automatically, according to the regular practice, but even if, for the sake of argument, the lodgment be treated as a removal for safe custody, I cannot see that such a removal is comparable with the type of removal

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considered in the cases to which Mr. Fawell has referred. The removal from Grindlay's Bank was not a temporary removal. It was intended to be a permanent removal. If the testatrix herself, not being of unsound mind, decided to transfer her dividend authority from Grindlay's Bank to another bank, nobody could suggest that that was a temporary transfer analogous to the case of removal of furniture for repairs or for greater safety during some particular time. People do not change their banks as a temporary measure. If the testatrix had done so, it would obviously have been a permanent act, changing, so to speak, the domicile of the holdings of stock from Grindlay's to some other bank. I cannot see that the order of the master in lunacy has any different character. It was not directing a temporary removal, but was making as permanent a removal as if the testatrix had done it herself.

In the result, therefore, although it may appear to be unjust or unfortunate, I find myself constrained to hold that the two stocks in question do not fall within the bequest to the two nephews and, accordingly, that this appeal fails.

FINLAY L.J. I agree.

MORTON L.J. I agree. I only want to add that Uthwatt J. decided this case on the assumption that the possession of the dividend mandate by Grindlay's Bank was sufficient to bring the stocks in question within the ambit of the phrase "in the "care custody or possession of Grindlay's Bank, Limited". As my Lord has said, this court has decided the case on the same assumption, without expressing any view whether that assumption is correct.

Appeal dismissed.

Solicitors: *Williamson, Hill & Co., for Page, Gulliford & Gregory, Southampton; Lovell, Son & Pitfield, for Pitfield & Oglethorpe, Petworth.*

H. C. G.

VAISEY J.

1944

Oct. 25.

In re DUPREE'S DEED TRUSTS.

DALEY *v.* LLOYDS BANK.

Charity—Education—Deed of gift to found annual chess tournaments —Open to young men and boys resident in specified town—Official and educational position of trustees—Money prizes to be applied for benefit of winners.

By a deed of gift, executed in 1932, the donor, who had transferred shares to the value of 5,000*l.* to a bank as custodian, declared that the bank was to pay the annual income of the fund to the trustees nominated in the deed to be applied by them in promoting an annual chess tournament open to boys and young men under twenty-one resident in the city of Portsmouth. The trustees, who were to manage the competition, were to be the lord mayor and the town clerk of Portsmouth, the chairman of the Portsmouth education committee, and the headmaster of Portsmouth Grammar School. The prizes, which were money prizes, were not to be paid in cash, but were to be applied for the benefit of the winners in the trustees' discretion. There was evidence by schoolmasters that the game of chess was regarded as of educational value, and was taught in some schools as part of the curriculum :—

Held, that, having regard to the restriction of the gift to a class of the inhabitants of a particular locality, the public and educational quality of the trustees, and the evidence as to the educational value of chess, the deed created a valid charitable trust and a scheme was directed.

ADJOURNED SUMMONS.

By a deed of gift, dated June 30, 1932, and made between the donor, Sir William Dupree, of the first part, the then lord mayor of Portsmouth and the chairman of the Portsmouth education committee (those two offices being held by the same person in 1932), the then town clerk of Portsmouth and the then headmaster of Portsmouth Grammar School, who and whose successors were in the deed defined as " the trustees " of the second part ; and Lloyds Bank Ld., defined as " the custodian trustee " of the third part, certain trusts were declared. The deed contained recitals (1.) that the donor wished to promote a chess tournament for the encouragement of chess playing, the competition to be held annually and to be open to boys or young men under the age of twenty-one years, who were resident in the city of Portsmouth ; (2.) that the donor wished to provide for prizes to be awarded in connexion with the tournament ; and (3.) that, in furtherance of these wishes, he had transferred into the name of the bank certain

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shares representing a sum of 5,000*l.* The deed provided, (1.) that the donor declared that the income arising from the shares or from the property for the time being representing the shares (defined as "the trust fund") should be applied in promoting and paying the expenses of the tournament; (2.) that the trustees were normally to be four in number, namely, the lord mayor of Portsmouth for the time being, the town clerk of Portsmouth for the time being, the chairman of the Portsmouth education committee for the time being, and the headmaster for the time being of Portsmouth Grammar School; (3.) that the management of the tournament should be under the control of the trustees. The income arising from the trust fund was directed to be applied in providing the cash prizes to be awarded at the tournament, the first prize to be 100*l.*, and the other prizes such amounts as the trustees might from time to time decide, but it was provided that the prizes were not to be paid in cash but were to be applied by the trustees as they might think fit for the advancement in life of the winners. The trustees took out this summons to have determined the question whether or not the deed created a valid charitable trust, and, if it did, to ask that a scheme be directed by the court for its administration. Lloyds Bank submitted to any order which the court might see fit to make.

Wynn Parry K.C. and *Raymond Jennings* for the trustees. This is a trust for the advancement of education and, therefore, a charity within Lord Macnaghten's definition in *Commissioners of Income Tax* v. *Pemsel* (1). We have evidence that chess is taught in many schools and generally encouraged as an intellectual pursuit. There has never been any attempt by judges to define education, and each case must be judged on its own merits. Had the gift been made to an institute or school, there would have been no difficulty in coming to the conclusion that it was charitable, but there may be a perfectly good charitable trust of this kind, not attached to any definite institution: see *Thompson* v. *Thompson* (2), where a gift by will to provide prizes for literary essays by young students in Edinburgh was held by Knight-Bruce, V.C., to be charitable. A gift for the purpose of an annual school treat has been held to be charitable: *In re Mellody* (3). Chess is not merely a game. It is also an

(1) [1891] A. C. 531, 544.

(2) (1844) 1 Collyer 381, 398.

(3) [1918] 1 Ch. 228.

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intellectual pastime, the playing of which encourages the mathematical type of mind. The trustees are to be limited to certain local official persons, two of them associated with education; the competition is limited to boys and young men of Portsmouth; and the prizes are to be applied for the benefit of the winners. These conditions assist the court to hold that the deed creates a valid charity. [They also referred to *Weir* v. *Crum-Brown* (1).]

Danckwerts for the Attorney-General. The gift creates a valid charity. In *In re Hadden* (2) Clauson J. held that a gift to provide playing fields and facilities for recreation for the people of Vancouver B.C. was a valid charity. Chess, as an intellectual recreation, may equally be the subject of a charitable gift

Wilfrid Hunt for the next of kin of the donor. This is not a charitable gift, being one simply to encourage the playing of a game by boys and young men. To encourage the playing of chess in schools would not be altogether desirable. It might take pupils away from cricket, football and athletic pursuits generally. The fact that the game is an intellectual game does not make the gift charitable. If it were so, it might follow that a gift to encourage bridge or whist, and many other games would also be charitable. Chess is not an object for charity, and the mere fact that the trustees are all associated with public offices cannot make the gift charitable: see *Houston* v. *Burns* (3).

Wynn Parry K.C. replied.

VAISEY J. In this case I have to decide whether the encouragement and promotion of chess-playing among the boys and young men of the city of Portsmouth is a good charitable object.

The game of chess (which, by those who follow it, as well, perhaps, as by those who do not follow it, is regarded as something rather more than a mere game) is an institution with a very long history behind it, and it possesses the somewhat notable feature that it is essentially a game of skill into which elements of chance enter, if at all, only to a negligible extent. It is a game which, I suppose, is played all over the civilized world. I have some evidence which enables me to say—and, indeed, I think I might have said it even without that evidence

(1) [1908] A. C. 162, 167.

(2) [1932] 1 Ch. 133.

(3) [1918] A. C. 33.

—that the nature of the game is such as to encourage the qualities of foresight, concentration, memory and ingenuity. Even unguided by actual evidence, I should not have been surprised if the conclusion could have been reached that the game is essentially one which does possess an educational value.

There are many pursuits possessing an educational value which may be followed to excess, and the matter is in no way concluded by any such consideration. Chess players may become so obsessed by the interest of their pursuit that they may neglect other duties, but the same thing may be said of those who range the mysterious country of the higher mathematics or indulge in the study of classical authors. I am not surprised to learn from the evidence that there are schoolmasters and persons actually concerned with the business of education who regard the playing of chess as something of so much value educationally that in some places it is actually a part of a school curriculum. For instance, Mr. Kipping, who has been for twenty years the headmaster of Wednesbury High School, in Staffordshire, a school at which there are 265 boys, or thereabouts, from the age of ten upwards, states that ever since 1927 the teaching of chess has formed part of the school curriculum. He deposes to the effect that all boys joining the school learn chess in groups of thirty to fifty or more with the aid of a demonstration board, that they then attend a number of lectures, and afterwards proceed to try simple manœuvres with pieces on their own account, and play actual games of chess with the older boys. Apparently, the amount of time devoted to chess in school hours at Wednesbury is two periods of about fifty minutes each in the week. Then there are inter-school chess matches between Wednesbury High School and certain schools at Wolverhampton, and challenge cups are offered as prizes in those competitions. Mr. Kipping's evidence shows that chess is not only taught at the Wednesbury High School, but takes a prominent place in the school life and ranks as one of the normal school games. He says: "My experience as a member of the teaching pro-"fession has convinced me that chess teaches concentration, "self-reliance and reasoning and is a most useful training for "the mind." That, apparently, is not a mere expression of opinion, for it is confirmed by the fact, as he says, that the forms which have been taught chess specially have been among those "which were most satisfactory in work." Then

I have the evidence of a Mr. Horn, who is headmaster of the Armstrong Street Boys' School, at Grimsby, a still larger school, having about 530 boys on the register. Mr. Horn has had thirty-eight years of experience of teaching in senior boys' schools and has been a headmaster for eleven years. He says that for fourteen years chess has been taught at his school at times during regular school hours, and, apparently, occupies a sort of half and half position between work and play. He says that, as a result of his experience of the teaching of the game, he has formed the opinion "that the qualities "developed are concentration and foresight." Lastly Mr. Rose, director of education for the county borough of West Bromwich since 1932, deposes that he has been a teacher for fifteen years, and on administrative work as an inspector of schools and assistant director and director of education for seventeen years. He stated: "My practical experience has "enabled me to form the opinion that the teaching of chess "has a real educational value. It encourages the powers of "concentration and reasoning, and this has been reflected in "the improvement in the position in form and average percentage of marks at the end of term examinations of pupils "at the West Bromwich Grammar School after they have "commenced to play the game seriously" In relation to that school, he says that chess there is an out-of-school activity.

I think that the case before me may be a little near the line, and I decide it without attempting to lay down any general propositions. One feels, perhaps, that one is on rather a slippery slope. If chess, why not draughts? If draughts, why not bezique, and so on, through to bridge and whist, and, by another route, to stamp collecting and the acquisition of birds' eggs? Those pursuits will have to be dealt with if and when they come up for consideration in connexion with the problem whether or no there is in existence an educational charitable trust. Nor do I say whether, if this trust had been without a geographical limitation, if it had been for the promotion of chess playing in vacuo or at large, the area of what is regarded as charitable would or would not have been over-stepped. Having regard to the evidence before me and to what is known about the game of chess by everybody, and, in particular, to the fact that the encouragement of chess playing here is for the benefit of young persons living within a well-defined area, and also that it is of the essence of the constitution of the trusteeship that two of the trustees should be persons closely connected with educational activities in the borough, I think I am bound, in the present case, to hold that there is a good charitable trust, and answer the question by declaring that the trusts constituted by the deed of June 30, 1932, are valid charitable trusts.

As there is a difficulty now in providing for an annual prize of 100*l.* and further prizes in accordance with the strict letter of the deed, I shall direct that a scheme be settled by the court.

Solicitors: *Norton, Rose, Greenwell & Co., for Sir Frederick Sparks, Town Clerk, Portsmouth; Coode, Kingdon, Cotton & Ward, for R. W. Sherwin & Son, Portsmouth; Treasury Solicitor.*

H. L. L.

In re HOLFORD'S SETTLEMENT.

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Settlement—Power of appointment—General power of appointment in default of issue—Special powers—Will—Devise of bequest of residuary estate—Property " over which I shall then have power of appointment."—Inconsistency between terms of power and of will—Validity of exercise of special powers.

Under a voluntary settlement made by a lady who had recently come of age, property was settled on trust for the settlor during her life and subject thereto on trust for such one or more of her issue as she should by deed or will appoint, without infringing the rule against perpetuities, and in default of such appointment for her children at twenty-one or marriage, and if more than one in equal shares. In default of such issue the settlor was to have a general power of appointment by will. The settlement further contained a special power to the settlor to appoint a life interest to a husband surviving her, subject to a forfeiture clause in the event of alienation or attempted alienation. The settlor was married in 1933 and died in 1943 leaving her husband and three children surviving her. By her will made in 1933 she had given all the remainder of her property of which she should be possessed at the time of her death including any property over which she might then " have power of appointment or disposition by will " on trust to pay the income to her husband for his life, but without any forfeiture clause, and subject thereto on trust to divide the capital and income into as many shares as she should leave children surviving her who should attain twenty-one or marry, and hold the same for such children, one-half of each child's share being thereby settled upon the child and his or her issue on trusts which

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as regards the property comprised in the settlement would have transgressed the rule against perpetuities :—

Held, that having regard to the inconsistencies between the settlement and the will, and in particular the absence of any proviso forfeiting the husband's life interest on alienation, and the transgression, expressly forbidden by the settlement, of the rule against perpetuities, the will was not an exercise of either of the two special powers, but only of the general power reserved to the settlor by the settlement.

In re Cotton (1888) 40 Ch. D. 41, and *In re Weston's Settlement* [1906] 2 Ch. 620 applied and followed.

In re Ackerley [1913] 1 Ch. 510 distinguished.

ADJOURNED SUMMONS.

By a voluntary settlement, dated May 18, 1928, and made betweed Kathleen Swain, spinster, as settlor, and Lloyds Bank Ld., as trustees, the settlor, after reciting that she had recently attained the age of twenty-one years and had transferred to the bank certain investments which she wished to settle, by cl. 1, declared that the bank was to hold the investments, defined as the " trust funds," on trust to pay the income thereof to the settlor during her life, and, subject thereto, to hold the funds and the income on trust for such one or more of the settlor's issue at such age or time and with such provisions for maintenance, education, and advancement, and in such manner, as the settlor should by deed with or without power of revocation or by will or codicil, " without transgressing the rule against " perpetuity," appoint, and, in default of such appointment, for all the children of the settlor who should attain the age of twenty-one years or marry, in equal shares, with the usual hotchpot clause. In the event of and after the determination and failure of preceding trusts the settlor had a general power of appointment by will, and, in default of and subject to any such appointment, the bank was to hold the trust funds or so much of the same as had not become vested under the previous trusts, in trust for such persons as under the Administration of Estates Act, 1925, would have become entitled to the trust funds at the death of the settlor if she had died absolutely entitled thereto intestate domiciled in England and a spinster, or, if she should have married, a widow. By cl. 3 of the settlement the settlor reserved to herself a further special power, namely, a power by deed or will to appoint a life interest in the trust funds to a future husband if he should survive her, but subject to a proviso determining any interest so appointed in the event of alienation or attempted alienation of such interest by the husband. In 1933, the settlor married Lindsay Holford, and there were three children of the marriage. The settlor, by her will, dated in 1933, having appointed her husband and her sister, Mrs. Slattery, to be executors and trustees, gave the residue of her property whatsoever and wheresoever both real and personal " of or to which I shall be seised possessed or en- " titled at my death or over which I shall then have power of " appointment or disposition by will, including all property (if " any) in which I may have an entailed interest in possession " to her trustees on trust for sale and conversion and out of the proceeds of such sale to pay her funeral and testamentary expenses and debts and to invest the residue. By cl. 6 the trustees were to pay the income of the investments (the " trust " fund ") to her husband, Lindsay Holford, during his life, and, after his death, to divide the fund into as many shares as there should be children of hers living at her death and who should attain twenty-one or marry, one-half of the share of each child being settled by cl. 8 and 9 on such child for his or her life, and, subject thereto, in trust for the child or children of such child as that child should by will appoint, and, in default of appointment, equally. In 1943, the settlor died, and her will was proved by Mrs. Slattery on October 23, 1943, the value of the estate being sworn at just under 3,000*l*. The value of the settled funds was about 6,000*l*.

This summons was taken out by Lloyds Bank, as trustees of the settlement of 1928 to determine whether the settlor did or did not by her will exercise any and which of the three powers of appointment, namely the two special powers and the one general power, reserved to her by the settlement, with consequential questions arising on the answer to that question.

Newman Hall (for *Rose*) for the plaintiffs.

Hewins for Lindsay Holford, the husband. There are many authorities on this question but the general principle is probably best stated by Sargant J. in *In re Ackerley* (1). It is submitted that cl. 3 of the will exercises both the two special powers and the general power under the settlement. The reply to the contention that the settlor only intended to exercise the general power is that she could do that by a general devise and bequest, and the words she used were unnecessary for the exercise of a general power. It is obvious that she intended to give an immediate life interest to her

(1) [1913] 1 Ch. 510, 515.

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husband and she could only do that by the exercise of the special power under cl. 3. She could not have intended to give him merely a contingent reversionary life interest which was all she could do under the general power. She clearly intended by the will to dispose of all her property, including even an entailed life interest in real property (if any), but it is significant that she did not use the words " if any " with regard to the powers she was exercising by her will. Unless all the powers were duly exercised, no effective meaning could be given to the language of the will. [*Ferrier* v. *Jay* (1); *In re Milner* (2); *In re Wait* (3); *In re Swinburne* (4) were also cited.]

Michael Albery for the settlor's three infant children. The will did not exercise the special powers, and, therefore, the children take equally between them in default of appointment. The husband takes only a contingent life interest in the event of none of the children attaining the age of twenty-one. There is no authority exactly covering the present case, but the language of the will points to an exercise of the general power only. Where all the words are referable to other property or to another power mixed up with a general gift of free estate, they should not be held to refer to the special powers or either of them. [Vaisey J. referred to *In re Teape's Trusts* (5).] If the testatrix had had any real intention of exercising the special powers by her will, she would have used different language. There is no reference in the will, as in the settlement, to the life interest of the husband being protected from alienation and no forfeiture clause. The settlement of one-half of each of the children's shares on their children is a breach of the rule against perpetuities, which is expressly prohibited by the settlement. Where all these difficulties occur in the same will, the matter is in balance, and the language used by the testatrix can be satisfied by a reference to the general power only: *In re Cotton* (6); *In re Weston's Settlement* (7); *In re Sanderson* (8); *Hope* v. *Hope* (9).

B. S. Tatham for the settlor's sister, representing the next of kin, adopted this argument and referred to *In re Slack's Settlement* (10). A reference to a power " if any " is a fatal objection to a due appointment.

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(1) (1870) L. R. 10 Eq. 550.
(2) [1899] 1 Ch. 563.
(3) (1885) 30 Ch. D. 617.
(4) (1884) 27 Ch. D. 696.
(5) (1873) L. R. 16 Eq. 442.
(6) (1888) 40 Ch. D. 41.
(7) [1906] 2 Ch. 620.
(8) (1912) 106 L. T. 26.
(9) (1854) 5 Giff. 13.
(10) [1923] 2 Ch. 359.

Hewins replied on the cases.

VAISEY J. having stated the facts, proceeded: It will be observed that the three powers are, first, the power of appointment among the settlor's issue: secondly, the power to appoint a life interest forfeitable on alienation to her husband—those being both special powers of appointment—and, lastly, a general power of appointment which can only be effectively exercised in the event of the failure of the trusts for the settlor's issue.

I will consider, first, the question of the exercise or non-exercise of the special powers. I preface what I have to say by adopting as my own the words with which Eve J. began his judgment in *In re Slack's Settlement* (1): "I might well "commence my judgment with the initial observation of "Pearson J. in *von Brockdorff* v. *Malcolm* (2) that this is a "case which no judge could decide without misgiving. With all "respect I find a difficulty in some of the cases cited, in "satisfactorily identifying in the instrument the words relied "upon as exercising the power or establishing an intention to "exercise it, but I must bear them in mind and take care that "in construing this will I avoid any conclusion which may "seem to be inconsistent with them." For my part, I find these cases extraordinarily difficult to reconcile. The principle, I think, is clear. The difficulty lies in the application of it. The principle has been stated in various ways, and, in differing words, but I know no better exposition of it than that contained in *In re Ackerley* (3), where Sargant J., in a passage frequently quoted in later decisions, said: "It is often said that in order "to exercise a special power there must be either (1.) a reference "to the power, or (2.) a reference to the property subject to "the power, or (3.) an intention otherwise expressed in the "will to exercise the power: see Theobald on Wills, 7th ed., "p. 248, and *In re Weston's Settlement* (4). This is no doubt "a good practical way of stating the rule. But when more "closely examined the first two alternatives are seen to be in "reality only particular examples of the rule embodied in the "third alternative, as, indeed, is implied in the use in that "alternative of the word 'otherwise.' And accordingly "I should prefer to state the rule thus, namely, that in order to "exercise a special power there must be a sufficient expression

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(1) [1923] 2 Ch. 359, 362.
(2) (1885) 30 Ch. D. 172, 179.
(3) [1913] 1 Ch. 514.
(4) [1906] 2 Ch. 620.

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"or indication of intention in the will or other instrument "alleged to exercise it; and that either a reference to the "power or a reference to the property subject to the power "constitutes in general a sufficient indication for the purpose. "I say 'in general' because, for instance, where, as here, two "powers exist with reference to the same property, it might "well be that a reference to the property would not indicate "any intention to exercise more than one of the powers."

The difficulty in each case is to find the intention by the process of balancing the considerations on one side against those on the other side. In case after case, judges have confessed to the difficulty with which they have allowed one of the two scales to outweigh the other. In *In re Ackerley* (1), from which I have just quoted, the question was whether a special power to appoint the income of a fund in favour of a husband during his life was well exercised by a will which, so far as material, simply consisted of these words: "I give, devise, appoint and "bequeath all my estate, property and effects, whatsoever and "wheresoever, both real and personal, which I have power "to dispose of by my will, to my said husband absolutely." In that case the property was not, of course, the testatrix's property at all, nor had she power to give it absolutely to the husband, but, in spite of those two elements of inappropriate expression, the court came to the conclusion that effect must be given to the word "appoint" and to the general intention of the testatrix that, whatever she could give to her husband, he was to have, and it was held that the will did execute the special power. There was but one power there, and, if it had not been held to be executed by the will, no effect would have been given to the word "appoint."

I will call attention to a few of the cases on either side and then attempt to express the reasons which lead me to follow the one line of case rather than the other. In *In re Swinburne* (2) Pearson J. held that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised. It will be observed there that there is a reference to property "over "which she might have any testamentary power of disposi- "tion," clearly pointing to an intention to exercise some power so far as she could do it. True it was that the direction to pay her debts and funeral expenses and pecuniary legacies was wholly inappropriate to the property which was the subject of the power, and, indeed, had no effect whatever on it. Nevertheless, it was held, reddendo singula singulis, that this direction could be held to apply to the testatrix's free property, and was not sufficient to displace the previously expressed intention to exercise any testamentary power of disposition which the testatrix might have.

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(1) [1913] 1 Ch. 510.

(2) 27 Ch. D. 696.

In re Milner (1), before Stirling J., was very similar to *In re Ackerley* (2). There a woman had a special power of appointing a life interest in favour of her husband, and by her will, after giving legacies to other persons out of her separate estate or out of the estate and effects over which she had a disposing power, she proceeded in these words: "I give, "bequeath and appoint all the residue of my estate and effects "whatsoever and wheresoever unto my husband absolutely." Having no other testamentary power of appointment which she could exercise, she died in April, 1883, and it was held that the power was well exercised. Stirling J. quotes the rule as stated by Pearson J. in *von Brockdorff* v. *Malcolm* (3): "The simple question is, whether I can find in the will "itself such an indication of an intention to exercise the "power as that I ought to hold that the power has been "exercised. It is a question of intention, and a question "of intention only. There being various indications in "the will, some one way and some the other, the question "I have to decide as well as I can is, on which side does the "balance weigh most strongly? When you have put the one "against the other, to which side ought you rather to incline "in order to determine what is the real truth of the case with "regard to the intention of a man of whose intention you know "nothing except what you find in his will?" That concludes the quotation from Pearson J. in a passage subsequently cited with approval by North J. in *In re Cotton* (4). Now I read the words of Stirling J.: "In applying a rule of this kind, little "assistance is to be got from decisions on wills differing in "form and expression. I may state, however, that where a "will is found containing a general expression of intention to "execute any disposing power to which the testator may be "entitled the court has repeatedly refused to infer the contrary "intention from such circumstances as a direction to pay "debts or funeral expenses, or legacies, or bequests in favour "of persons not objects of the power." After referring to other cases including *In re Cotton* (4), he sums up the indications on

(1) [1899] 1 Ch. 563, 565, 566.
(2) [1913] 1 Ch. 510.
(3) 30 Ch. D. 172.
(4) 40 Ch. D. 41, 44.

each side in that case, and comes to the conclusion : " On the " whole, applying the rule stated as well as I can, I am of " opinion that the power has been exercised."

In *von Brockdorff* v. *Malcolm* (1), the case from which I have already quoted the opening words of Pearson J., the testator had, under a settlement, a power of appointment over certain leasehold and other personal estate, among his children or grandchildren or other issue. He made a will containing no reference to the power and gave " all the real and personal " estate and effects whatsoever and wheresoever, whether in " possession, reversion, remainder or expectancy, over which, " at the time of my decease, I shall have any beneficial disposing " power by this my will " . . . . to trustees, upon trusts partly for persons who were objects of the power, and partly in excess of the power. It was held that the use of the word " beneficial " did not conclusively show that the testator could not have intended to exercise a power which he could not exercise for his own benefit or the benefit of his estate. The learned judge came to the conclusion that, on the will, taken as a whole, " a special indication of an intention to exercise the " power " could be found. It was also held that the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative. In *Ferrier* v. *Jay* (2) before Malins V.C., there was both a general power and a special power. There was a general power to appoint 500*l.* and a special power to appoint the residue of certain property. The testatrix there gave all her real and personal estate whatsoever and wheresoever, and to which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral and testamentary expenses, and then to divide the residue between the objects of the special power. It was held that the special power was well exercised. Malins V.C. deals with the point about the direction to pay debts, and says : " Now, when she " directs her own debts to be paid we may suppose that she " intended that they should come out of that portion of the " property over which she had a general power, and, upon the " well known rule of reddendo singula singulis, it may well be " supposed that she meant her debts to come out of that " property which was, in effect, her own, and the rest to pass " to those who were the objects of the special power." I think those are the representative cases in which it was held that the balance of indication in favour of exercising the power was, in the view of the court, the predominant one.

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(1) 30 Ch. D. 172. (2) L. R. 10 Eq. 550, 553.

On the other side I will refer, first, to *In re Cotton* (1) which I have already mentioned. There " a testatrix devised, " bequeathed, and appointed her residuary estate, including all " property over which she should have at her death a power of " appointment, on trust, after payment thereout of debts, " testamentary and funeral expenses, to apply so much as the " trustees should think fit of the income during the minority " and spinsterhood of her only child, a daughter, for her " maintenance and to accumulate the surplus, and on the " daughter attaining twenty-one or marrying the whole to her " for life, with remainders over. The testatrix had a power " of appointment among her children over property settled in " default of appointment on such children at twenty-one or " marriage." It was held by North J. that the power was not well exercised. The next case in which the decision was against the effective exercise of the power was *In re Weston's Settlement* (2). There, there was a settlement under which sums were settled in trust after the decease of the survivor of a husband and wife " for all and every the children and child of " the said intended marriage in such parts and shares as the " survivor . . . . should by . . . . will . . . . or by any " codicil appoint." The husband survived his wife and, after specific bequests, " he gave, devised, bequeathed and " appointed all the residue of his 'estate,' 'real as well as " 'personal' unto trustees upon trust to convert into money " such parts of 'the said trust premises' as should not consist " of money, and out of the proceeds to pay his funeral expenses " and debts, and to pay and divide the residue of 'such trust " 'moneys and premises unto and equally between' his " sons A, P and R." It was held that the will did not operate as an exercise of the special power given by the settlement. Buckley J. referred to *von Brockdorff* v. *Malcolm* (3), and called attention to the fact that, as regards the property subject to the power the husband could not direct conversion. Therefore either he had directed the conversion of the property subject to the power—which he could not do—or that property was not within the words " trust premises." He proceeded : " In this " I find a first indication that he was not dealing with the " property which was subject to the power. Then he gives his

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(1) 40 Ch. D. 41.

(2) [1906] 2 Ch. 620.

(3) 30 Ch. D. 172.

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"trustees power to postpone the conversion of 'my said real "'and personal estate'." .... "If he was disposing of "the property which was subject to the power, he was here "giving power to postpone the conversion of that property. "But he had no power to direct either its conversion or the "postponement of its conversion. This is a second indication "that he was not dealing with the property the subject of the "power. Then there is a power to manage and let 'my "'real and leasehold estates,'" and a direction to invest. Then the learned judge calls attention to the fact that all those directions are ridiculous, even if they were supposed to be applicable to the property the subject of the power. The learned judge continues: "He here treats the share of the "beneficiary in the aggregate sum as being property as to "whose investment he is competent to give directions. "Reading the whole will, therefore, I find the verb 'appoint' "on the one side of the balance, and all the several considerations to which I have adverted on the other. In my judgment "the scale falls against the inference to be drawn from the "use of the verb 'appoint'." Then he refers to *In re Mayhew* (1), a decision of Farwell J., and to *In re Cotton* (2), where he notes "even in a will which contained words to that "effect"—that is, a general reference to power—"North J. "nevertheless, upon indications similar to those upon which I "rely, held that the power was not exercised." The result was that in *In re Weston's Settlement* (3), Buckley J. held that the will did not exercise the special power.

In *In re Sanderson* (4), before Neville J., a testatrix who had a special power of appointment among her children by her will gave, devised, bequeathed and appointed all her real and personal estate not thereby otherwise disposed of (including all property over which she had a power of appointment) unto her trustees upon certain trusts, including a trust to pay the income to her husband for life, and from and after his decease in trust for all her children in equal shares. It was held, that the testatrix, by dealing with all her property in the mass, could not be considered to have shown an intention to exercise her special powers, although she used the word "appoint." *In re Weston's Settlement* (3) was there followed and approved. Neville J. in one of those short judgments of his, from which there was always exclusion of all irrelevant matter, said:

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(1) [1901] 1 Ch. 677.

(2) 40 Ch. D. 41.

(3) [1906] 2 Ch. 620.

(4) 106 L. T. 26, 27.

"A testator cannot be held to have by his will exercised a "special power of appointment unless it be shown that he had "an intention to exercise the power. Where a testator is "found dealing with all his property in the mass, without "making any distinction as to his various kinds of property, "and not drawing a difference between the property of which "he was absolutely entitled from that over which he had only "a power of appointment, I do not think I can hold that there "was any intention on the part of the testator to exercise his "special powers of appointment. Certain cases have been "cited to me where the use of the word 'appoint' has been "held to show an intention to exercise special powers of "appointment. If these decisions stood alone, I should not "feel justified in differing from them, especially as I am very "much disinclined to draw fine distinctions in construing wills, "as the only result of so doing is to embarrass testators. "However, the will in this case is not like those in question in "those cases, but appears to be very similar to that before "Buckley J. in *In re Weston* (1), and I do not think I can do "otherwise than follow that decision. The reasons for that "judgment are to a very great extent applicable to this case, "and I approve of them in full. I have no doubt that in this "case, considering the whole will, the testatrix had no intention "of exercising her special powers of appointment."

Another case to which I must refer is *In re Beresford's Will Trusts* (2), where Morton J. came to a conclusion similar to that reached by Buckley J. in *In re Weston* (1), and by Neville J. in *In re Sanderson* (3). There the testator had a special power of appointment among his children over the residue of his sister's estate exercisable by will. In two clauses of his will, one making a specific legacy and the other giving certain chattels to a trustee to hold upon certain trusts, he used the words "I give and appoint." In these clauses the word "appoint" was clearly surplusage. The clause dealing with his residuary estate was, so far as material, as follows: "I give "devise bequeath and appoint" the residue of the estate "to which I shall be entitled or of which I shall have any power "to dispose at my decease" to the trustee on trust for sale and conversion to apply the proceeds to the payment of debts, testamentary expenses and duties on legacies given free of duty, with directions for investment, followed by a life interest to his

(1) [1906] 2 Ch. 620.

(2) [1938] 3 All E. R. 566.

(3) 106 L. T. 26, 27.

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widow, who was not an object of the power, and, subject thereto for his children, who were objects of the power. It was held that the testator had not exercised the special power of appointment by his will. Morton J., after referring to the authorities, including most of those to which I have referred, said that there was a difficulty in reconciling the reasoning in all these cases, " but if there is any difficulty in reconciling the reasoning in " the two groups of cases, I should prefer to follow that in " *In re Cotton* (1), *In re Weston's Settlement* (2), and *In re Sanderson* (3)." He did follow that line of reasoning, and held that the will in the case before him did not exercise the special power of appointment.

That being the position, and with my mind to some extent clarified, but I think, also, to some extent, confused, by the cases, I turn to the will which is before me, and I find there, as was found in the cases last mentioned, provisions for the payment of debts, the payment of legacies, investment, and postponement of sale and conversion, all of which are completely inapplicable to the property which was the subject of the settlement of May 18, 1928. I find an intention to give an income to the husband for his lifetime, but I find no hint or suggestion, that, in giving him that, she was bound to subject him to conditions of forfeiture. When we come to the trusts in favour of the children, the settlor, if this settlement had been under consideration even to the remotest degree, would have been reminded by her advisers that the power to appoint among her children was expressly limited to an appointment which did not transgress the rule against perpetuities, and yet, in appointing to her children, she does transgress that rule by attempting to settle one-half of a share on each of them on trust for children and grandchildren which would clearly go beyond the limits which that rule allows. The only indication of an intention to exercise her powers that I can find in the settlor's will are the words which appear in cl. 3, " my property over which I " shall then have power of appointment or disposition by will." She had a general power of appointment or disposition in certain events, namely, the general power of appointment reserved to her under cl. 1 (5.) of the settlement. I cannot regard that general reference to power of appointment or disposition as sufficient to outweigh the other indications from the will which seem to point against any express intention to exercise

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(1) 40 Ch. D. 41.

(2) [1906] 2 Ch. 620.

(3) 106 L. T. 26, 27.

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either of the two special powers. If the only power which the settlor had had was a power to appoint the life interest to her husband, I incline to the view that the will might be held to have exercised that power. That may be, to some extent, guesswork, but I do find in this will an intention to give the husband whatever she could for his life. The difficulty, however, which I have in coming to that conclusion is that I cannot possibly hold that she exercised the special power in favour of her husband and did not exercise the special power in favour of her children.

There is so much in this will which points against the view that the settlor was exercising those special powers that I feel bound to hold that she exercised neither of them. I hold that she did exercise the general power, but, so far as the special powers are concerned, following the cases which I have cited on that side of the line of authority, I feel constrained to hold that this will did not exercise either of the special powers. One cannot help feeling that there must have been some incaution when the settlor's will was being drawn up. The value of the trust fund under the settlement was about 6,000*l.*, while her free estate is somewhere in the neighbourhood of half that amount. Whether her advisers knew of the existence of the settlement, or whether she herself had it in mind, I cannot say, but it seems to me that, looking, as I am bound to look, only at the words of the will, I must hold that those words contain no expression of intention to exercise either of these powers, and I therefore declare that the will operated (for what it is worth) to exercise the general power of appointment, but not either of these special powers.

Solicitors: *Richardson, Sadler & Co.; J. R. Pullon.*

H. L. L.

EVERSHED J.

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Oct. 24, 25; Nov. 9.

In re TATHAM, DECD.

NATIONAL BANK, LIMITED, AND MATHEWS *v.* MACKENZIE AND OTHERS.

Administration—Annuity—" Such sum in every year as after deduction " of income tax for time being payable in respect thereof will leave a " clear yearly sum of 350*l.* "*—Reliefs and allowances—Post-war credits—Finance Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 6, *sub-ss.* 2, 3, 4; *s.* 7.

A testator, by his will, provided that his trustees should pay to an annuitant: " such a sum in every year as after deduction of " income tax for the time being payable in respect thereof will " leave a clear sum of 350*l.* to begin from my death and to be " payable by equal quarterly payments in advance . . . . " :—

Held, that the annuitant was accountable to the trustees for a due proportion in respect of the annuity of all reliefs from and allowances of income tax to which she should be from time to time entitled, and was likewise accountable to them in respect thereof for a due proportion of any benefits to which she was or might become entitled under s. 7 of the Finance Act, 1941.

In re Pettit [1922] 2 Ch. 765; *In re Jones* [1933] Ch. 842; *In re Maclennan* [1939] Ch. 750, and *In re Eves* [1939] Ch. 969 considered.

ADJOURNED SUMMONS.

By his will, dated April 29, 1938, a testator provided that his trustees should pay to an annuitant free of duty " such " a sum in every year as after deduction of income tax for " the time being payable in respect thereof will leave a clear " sum of 350*l.* to begin from my death and to be payable by " equal quarterly payments in advance . . . ." On November 15, 1938, the testator died and on May 9, 1944, the trustees took out this summons. At that date the two residuary legatees were absolutely entitled under the will, subject to the annuity and to the payment, on the death of the annuitant, of three pecuniary legacies, to the capital and income of the residuary trust fund in equal shares. Section 6, sub-ss. 2, 3 and 4, of the Finance Act, 1941, reduce the extent of certain reliefs granted under earlier Finance Acts. Section 7 provides that the amount of additional tax paid by the taxpayer which is attributable to the effect of sub-ss. 2, 3 or 4 of s. 6 shall be recorded and notified to the taxpayer and shall be credited to the taxpayer at such date as may be fixed by the Treasury as soon as may be after the determination of hostilities in the war. By this summons, to which the annuitant and the residuary legatees were defendants, the trustees asked whether they, as trustees, were entitled to a due proportion, in respect of the annuity, of any sums repayable or allowable to the annuitant in respect of the reliefs and allowances to which she was entitled in calculating the income tax payable by her, or whether she was entitled to the whole of those sums, and, if the trustees were so entitled, whether their right extended to the post war credits to which the annuitant was entitled or was limited to sums repaid or allowed in cash in respect of those reliefs and allowances.

Winterbotham for the trustees.

Wilfrid Hunt for the annuitant. The trustees are not entitled to a due proportion, in respect of the annuity, of any sums repayable or allowable to the annuitant in respect of the reliefs or allowances to which she is entitled. If the language which the testator has used had occurred in a deed the annuity would clearly be a gross annuity, i.e., the annuitant would be entitled to that sum which, after deduction of tax, would leave the sum specified. There is no difference between " income tax " for the time being payable " and " income tax at the current " rate " or " at the standard rate." Therefore, in view of the form of words which he used, the testator had no need to use the words " at the standard rate " and, had he used them, they would have been mere surplusage. There is nothing in the will to show that " deduction " is not used in its strict and ordinary sense, in which it describes the process which takes place under r. 19 of the All Schedules Rules to the Income Tax Act, 1918. It refers simply to income tax deducted from the gross sum which is payable to the annuitant. It does not mean that she is not to recover it. The words " to be payable " by equal quarterly payments in advance " refer to an initial process, and shew that the tax for the whole of each period of twelve months is to be calculated at the beginning of that period. In *In re Pettit* (1) the testator gave an annuity free of income tax, which Romer J. construed as meaning free of the tax with which it had to be charged. In *In re Jones* (2) there was a bequest of " such an annuity as, after deducting " income tax therefrom at the current rate for the time being, " would amount to the clear yearly sum of 350*l*." Eve J. distinguished the case from *In re Pettit* (1) which, he said,

(1) [1922] 2 Ch. 765.

(2) [1933] Ch. 842.

would have covered it had the testator bequeathed the annuity free of income tax, which he had not done. He held that "the current rate" there meant "the standard rate," not the rate which the annuitant might ultimately have to pay, and that the bequest was of an annual sum liable to fluctuation in accordance with the movement up or down of the standard rate. In *In re Maclennan* (1) an annuitant was given by deed such an annual sum as, together with an annuity of 250*l.* not free of tax which a testator had given her by his will, would, after deduction of income tax but not surtax, leave in her hands 500*l.* clear of all deductions free of income tax but not surtax. The court distinguished the case from *In re Jones* (2) and held that the annuitant was entitled to the clear yearly sum of 500*l.*, and had to return the income tax to the trustees in accordance with *In re Pettit* (3). In the present case "in respect thereof" means "in respect of such "a sum," i.e. the gross sum. The full formula is "such a gross "sum in each year as, after deduction of a sum in each year "payable in respect of that amount, will leave a clear sum of "350*l.*" That is an impersonal formula and has no relation to the particular position of the annuitant. Until *In re Maclennan* (1) it was accepted that, where an annuity is given in the gross form, the annuitant does not have to account for reliefs and allowances. The annuities in *In re Jones* (2) and *In re Maclennan* (1) were gross annuities. Those in *In re Kingcome* (4), *In re Pettit* (3) and *In re Eves* (5) were not. In the present case the testator has not chosen to give a net annuity, for he has not said "350*l.* a year free of income tax" which would have had that result, *In re Pettit* (3). With regard to the post-war credits dealt with in the second question, the annuitant is not accountable for any proportion of them.

Skone James for the residuary legatees. The annuitant must account for a due proportion, in respect of the annuity, of the reliefs and allowances which she receives. The direction in the will is merely the indication of the method of calculating the gross sum directed to be paid. The contention that the formula is impersonal is unsound, for the income tax here to be deducted is not tax at a standard rate which has no relation to the annuitant's position. The testator has merely directed the trustees to make a deduction by reference to the income tax which will be paid in respect of the sum. Had he been referring to an abstract amount of income tax, it would have been enough to say simply "after deduction of income tax." He has however referred to the annuity (in the words "such "a sum in every year") and it is, therefore, clear that the words "in respect thereof" mean "in respect of that amount." Only where the words "current rate" or "standard rate" are used is the rule in *In re Pettit* (1) departed from. The expression "standard rate" appears as early as 1920: see Finance Act, 1920, s. 23. It appears also in Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. 2, p. 19, note (*b*); 12th ed., vol. 2, p. 17, note (*b*). When the words "current rate" or "standard rate" are not used "income tax" has its normal meaning of income tax after taking into account all other reliefs and allowances. Here the testator intended income tax in respect of the gross sum to be deducted and the annuitant to receive what remained. The onus is on the annuitant to show that that was not intended, and it is not discharged simply by contending that there is no difference between "income tax for the time "being payable" and "income tax at the current rate." The testator's words are not those which a draftsman would use to exclude the rule in *In re Pettit* (1). Even if, on the words of the will, income tax at the standard rate is to be deducted, still "deduction" refers, not to the process under r. 19 of the All Schedules Rules, but to the method of mathematical calculation. It is not an "echo" of r. 19; *In re Maclennan* (2).

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(1) [1939] Ch. 750.
(2) [1933] Ch. 842.
(3) [1922] 2 Ch. 765.
(4) [1936] Ch. 566.
(5) [1939] Ch. 969.

Cur. adv. vult.

1944. Nov. 9. EVERSHED J. read a judgment inwhich he stated the facts and continued: The first question is one of construction and the answer to it depends on the meaning properly to be given to the words used in this particular will. Nevertheless it will be convenient to refer first to *In re Pettit* (1), *In re Jones* (3), and *In re Maclennan* (4) because, where distinctions of language are fine, it is plainly necessary to observe carefully the grounds on which the decisions of cases of the same kind have proceeded, if conflict of reasoning and uncertainty in the law are to be avoided. It is, moreover, clear that the language of this will falls somewhere

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(1) [1922] 2 Ch. 765.

(2) [1939] Ch. 750, 757.

(3) [1933] Ch. 842.

(4) [1939] Ch. 750.

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mid-way between the terms used in the wills discussed in *In re Pettit* (1) and *In re Jones* (2); and I observe that in the plaintiffs' affidavit in support of the summons the problem is stated as being whether in the present case the decision in *In re Pettit* (1) or that in *In re Jones* (2) is applicable.

In *In re Pettit* (1) the question arose with reference to the gifts of two annuities, each expressed in the simple form permissible in wills to which r. 23 of the All Schedules Rules in the Income Tax Act, 1918 (3) is inapplicable, namely, "To AB an annuity of X*l.* a year free of income tax." The late Lord Romer, as a judge of first instance, decided on the construction of that will that the testator's purpose was to provide in each case for the object of his bounty an addition to her income after discharging liability for income tax of X*l.* and no more and that the annuitant was accountable to the trustees in respect of any reliefs and allowances received by her, the retention of which would have increased the benefit received by her from the testator to a figure greater than X*l.*: and I note that the learned judge was not deterred from reaching this conclusion by the circumstances that the testator had provided for payment of the annuity by equal quarterly instalments. In arriving at his decision Lord Romer explained that in his view the direction to pay "X*l.* free of "income tax" necessarily meant that the trustees would each year have to provide "such a sum as after payment of the "tax properly payable thereon would leave a clear sum of X*l.*"

In *Michelham's Trustees* v. *Commissioners of Inland Revenue* (4), the same point arose incidentally, and Lord Romer, then a member of the Court of Appeal, said (5): "Where a "testator by his will purports to give an annuity free of income "tax, the will necessarily must be read as conferring upon the "annuitant such an annuity as, after deduction of the tax "therefrom, shall leave the clear sum mentioned by the "testator." It will be observed that Lord Romer's paraphrase in that case differs slightly from that used by him in *In re Pettit* (1), and is more close to the language used in the present case, particularly in the use of the word "deduction" in reference to the income tax.

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(1) [1922] 2 Ch. 765.

(2) [1933] Ch. 842.

(3) By r. 23, sub-r. 1: "A person who refuses to allow a deduction of tax authorized by this "Act to be made out of any payment shall forfeit the sum "of 50*l.*" By sub-r. 2: "Every agreement "for payment of interest, rent, "or other annual payment in full "without allowing any such "deduction shall be void."

(4) (1930) 15 T. C. 737.

(5) Ibid. 751.

In *In re Jones* (1) the material language of the testator's gift was "such an annuity as after deducting therefrom income tax "at the current rate for the time being would amount to the "clear yearly sum of 350*l*. . . . ." On this form of words Eve J. held that the annuitant was entitled to retain any reliefs recovered without liability to account to the trustees of the will. It is, however, clear that the learned judge founded himself upon the addition of the phrase "at the current rate" to the reference to income tax, which phrase he construed as meaning "at the standard rate."

In *In re Maclennan* (2) a similar problem arose out of the language of a deed, but it is plain from the judgment of the Lord Greene M.R. in the Court of Appeal that no difference of principle applies in construing deeds from that applicable to wills. The words used in *In re Maclennan* were (3): "such "an annual sum as . . . . would . . . . after deduction of "income tax but not sur-tax leave in her hands the sum of "500*l*. clear of all deductions for income tax, but not sur-tax," and the Court of Appeal, affirming the decision of Bennett J., held that, as in *In re Pettit* (4), the recipient of the annuity was accountable in respect of all reliefs and allowances obtained by her. In the course of his judgment Lord Greene M.R. drew attention to the reference to sur-tax in the language I have quoted (5) as showing that the word "deduction" could not have been intended to import the administrative process specified in r. 19 of the All Schedules Rules—was not an echo of that rule. I do not, however, read Lord Greene's judgment as meaning that in the absence of such a reference the use of the word "deduction" must be taken to be such an echo. The learned Master of the Rolls further laid stress on the phrase "leave in her hands" as an indication that the emphasis, so to speak, was on the net sum mentioned as being the full extent of the benefit intended. He then considered the earlier cases and with reference to *In re Pettit* (4) said (6): "But the reason-"ing by which the learned judge arrived at the conclusion he "did—namely, that the annuitant was bound to account for "the sum recovered to the estate,—was reasoning which, in "my judgment, applies equally in the present case. He treats

(1) [1933] Ch. 842.
(2) [1939] Ch. 750.
(3) Ibid. 750, 751
(4) [1922] 2 Ch. 765.
(5) [1939] Ch. 750, 757.
(6) Ibid. 758, 759.

"the direction in the will as a direction to the trustees to ascertain what is the gross sum which will give the net annuity "specified, a clear sum of 1,000*l.* He points out that in calculating that gross sum it would lead to an inaccurate result "if the trustees merely calculated it by reference to the "deduction which it was permissible for them to make without "reference to the recoveries which the annuitant might obtain. "He says that the true calculation which the trustees ought to "make is to ascertain a sum which, after taking not merely "the initial deduction but also the matter of the relief into "account, will produce the net sum specified. If I may say so "with respect, that reasoning appears to me to be as satisfying "as any reasoning can be. The case, of course, was the case "of a will, and the phrase used was 'free of income tax.' "In the case of a deed the result desired cannot be obtained by "phraseology such as that by reason of r. 23, and it is for that "reason, as I have already said, that when it is desired to "produce a similar result in the case of a deed the formula "which must be adopted is the formula which gives you the "sum which I have described as X. The interesting thing "about Romer J.'s decision is that in analysing the language "of that will he treats it as though it was an instruction to "arrive at a sum X by means of a formula of that character, "and that is the meaning which he attributes to the words "'free of income tax' in a will."

Before leaving *In re Maclennan* (1) I observe that, as pointed out by Lord Greene M.R., the effect with regard to reliefs and allowances of the Income Tax legislation applicable to that case, and also applicable to the annuity under the present will is that those reliefs are treated as repayments to which the annuitant is entitled of part of the income tax already paid on the annuitant's behalf; so that until those reliefs have been received there will in fact have been, by virtue of the machinery of deduction under r. 19, an over-payment of the tax to which the annuitant is properly liable in respect of the annuity. I add also that, under the Income Tax legislation applicable in *In re Maclennan* (1) and in the present case, "income tax" comprehends both income tax at what is called the standard rate—that is, at the rate fixed from year to year at so much in the pound—and also additional income tax commonly known as sur-tax.

With these decisions in mind, I now turn to the relevant

(1) [1939] Ch. 750.

words of the present will. The effect of the Finance Act, 1941, in the present case has been to qualify the extent of the benefit in respect of income tax conferred by the testator, but this qualification is immaterial for present purposes. For simplicity, therefore, I shall ignore the qualification, and I also leave out of account that since the annuitant appears to have other income than the annuity given by the will, her liability, if any, to account is limited to a proportion only of the reliefs and allowances received by her.

In my judgment, the question as a matter of construction turns on the proper meaning to be given to the words " income " tax . . . . payable in respect thereof." The word " thereof " must mean " of the gross annuity before mentioned." What, then, is the income tax payable from time to time in respect of that gross sum ? The income tax in fact payable by any individual in respect of any sum of money will depend on the particular circumstances of the individual and will be arrived at after taking into account all reliefs or other allowances to which that individual may from time to time be entitled. Whose tax liability, then, has the testator in mind ? In my judgment, in this bequest he is considering the income tax liability of the annuitant. His aim is to relieve her from liability for income tax in respect of the annuity. On this view, and treating the problem as being one of the true meaning of a few English words, it seems to me that the income tax from time to time payable by the annuitant in respect of the gross annuity here directed to be paid must mean the income tax to which she is ultimately found to be liable in respect of the annuity after account has been taken of all reliefs and other allowances which the circumstances from time to time applicable to her case entitle her to obtain. Put in another way, I think that " the charge "—if I may respectfully borrow the language of Bennett J. in the court of first instance in *In re Maclennan* (1)—" means what it says, that income tax " means income tax and not income tax at the standard " rate . . . . " ; and I add that if Mr. Hunt's argument is accepted that " deduction " imports a reference to or echo of r. 19 of the All Schedules Rules so that the relevant phrase in the will should be construed as equivalent to " after deduction " of the income tax at the standard rate payable in respect " thereof," the addition of the words " at the standard rate " to this formula would be mere surplusage, a conclusion which

(1) [1939] 1 All E. R. 587, 590.

seems to me at variance with well-established canons of construction and also with the reasoning of Eve J. in *In re Jones* (1), in resting his decision on the presence in the instrument before him of the words " at the current rate."

Mr. Hunt, for the annuitant, laid stress on the word " deduction " and invited me to hold, in the absence of any contrary context, that its use did indicate a reference to the process described in r. 19 of the All Schedules Rules ; but, in my judgment, this common English word is equally referable to an arithmetical process, and, as I have said, I do not think the Master of the Rolls intended to lay it down that in such a context as the present the primary sense of the word was to import the process of r. 19 ; and I am supported in this view by Lord Romer's paraphrase in *Michelham's Trustees* v. *Commissioners of Inland Revenue* (2).

Mr. Hunt further pointed to the direction for payment of the annuity by equal quarterly payments as an indication that the testator intended a single and final calculation to be made. I do not think the inference is strong enough to outweigh what I take to be the ordinary meaning of the language, any more than did the presence of a similar direction in *In re Pettit* (3). Indeed, I note that the direction appears in any case to be impossible of strict performance, since the yearly periods for the purposes of the testator's will do not correspond with the income tax years.

Finally, Mr. Hunt argued that the testator, in using this formula instead of the simple form of gift permissible in wills —X*l.* a year free of income tax—must be taken to have intended a result different from that which would by virtue of the decision in *In re Pettit* (3) have flowed from the use of the latter form. Such a conclusion would, in my opinion, go beyond the inference permissible to be drawn from the use of what is now a common formula—intended in the case of deeds to achieve exactly the same result as the simpler form prohibited by the rules. Nor do I think that the points relied on by Mr. Hunt cumulatively have sufficient force to prevail against the contrary argument to which I have referred, and to which I add, finally, that the real intention of the testator, as I construe his will, was to provide for the annuitant an addition of a specified amount, and no more, to what is sometimes called her " spending " income.

(1) [1933] Ch. 842.
(2) 15 T. C. 737.
(3) [1922] 2 Ch. 765.

The conclusion which I have reached is, in my judgment, in conformity with the reasoning in the three cases to which I have referred, and, particularly, with the analysis of Lord Romer's reasoning in the judgment of Lord Greene M.R., which I have already quoted. I venture respectfully to add to what the Master of the Rolls has said the passage in Lord Romer's judgment in *Michelham's Trustees* v. *Commissioners of Inland Revenue* (1) to which also I have referred. As I understand it, the reasoning underlying all these decisions involves the result that, in formulæ of the kind here in question, there must be found, if the annuitant is to be held not accountable in respect of reliefs and other repayments, a limitation, by express words or necessary inference, of the phrase "income tax" to "income tax at the standard rate"; and that, in the absence of express words, the necessary inference will not be lightly drawn. This last observation is, in my judgment, supported by the decision of Morton J. in *In re Eves* (2). The annuitant is, therefore, accountable to the trustees for a due proportion (in respect of the annuity) of all reliefs from and allowances of income tax to which she is from time to time entitled.

If I am right so far, it is, I think, clear as a matter of logic, and it has not been disputed, that, subject to what follows, the annuitant is equally accountable in respect of any benefits of the kind described in the second question to which she is or may become entitled.

The term "Post-War Credits" has arisen out of ss. 6 and 7 of the Finance Act, 1941. The effect of those sections, so far as material for present purposes, may be shortly stated as follows. By s. 6, sub-ss. 2, 3 and 4, the extent of certain reliefs granted under earlier Finance Acts was reduced. Section 7 provides that the amount of additional tax paid by the taxpayer which is attributable to the effect of sub-ss. 2, 3 and 4 of s. 6, shall be recorded and notified to the taxpayer and shall be credited to the taxpayer at such date as may be fixed by the Treasury as soon as may be after the determination of hostilities in the present war. From my recital of the effect of these two sections it will be seen that the expression "post-war credits" is something of a misnomer. The taxpayer at present has no "credits." He has been given (by the Act) a promise that at some future date after the war he will obtain a "credit" for an amount of which he has already been notified. The second

(1) 15 T. C. 737. (2) [1939] Ch. 969.

question may, therefore, well be said to be a "future "question": but since the residuary legatees are now absolutely entitled between them to the capital and income of the testator's residuary trust fund subject to the annuity and to three legacies payable on the annuitant's death, no question can hereafter arise between capital and income, so that the question can be answered immediately. I will declare that the annuitant is accountable to the trustees for a due proportion (in respect of the annuity) of any rights or benefits to which she is or may become entitled by virtue of s. 7 of the Finance Act, 1941. The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors: *S. F. Miller, Mathews & Co.; Wilberforce, Allen & Bryant.*

K. R. A. H.

VAISEY J.
1944
Nov. 7, 8, 13.

In re X——————'s SETTLEMENT.

Infant—Ward of court—Wards in England—Matrimonial domicile of parents in Scotland—Divorce proceedings in Scotland—Application in England for leave to apply to court in Scotland for custody.

Two infants were made wards of court in England by their mother. The matrimonial domicile of the parents was Scottish, and the father later brought an action in the Court of Session for dissolution of marriage and custody of the infants. He was advised that the Court of Session might feel a difficulty in exercising its jurisdiction over the children because they were wards of court in England, and he applied to the Chancery Division for leave to apply for custody in the action in the Court of Session and to carry out whatever order that court might make, or, alternatively, for leave to either parent to apply in that court, in that action or otherwise, notwithstanding that the infants were wards of court in England:—

Held, that neither form of relief was proper to be granted as the jurisdictions of the Courts of England and Scotland for the care and protection of infants were exercised concurrently and could not conflict.

Stuart v. *Bute* (*Marquis*) (1861) 9 H. L. C. 440, and *In re B——————'s Settlement* [1940] Ch. 54 applied.

ADJOURNED SUMMONS.

On December 22, 1943, the mother of the two plaintiffs, who were infants, executed a settlement for their benefit and appointed trustees thereof. On January 12, 1944, the action, in which the infants were plaintiffs and the trustees defendants, was begun by writ asking for the execution of the trusts of the settlement. The infants thereupon became wards of court. Their father was a Scotsman and the matrimonial domicile of their parents was Scottish. On July 28, 1944, the father began in the Court of Session in Scotland an action (which was pending at the date of this summons), for dissolution of marriage and for custody of the infants "with leave to either party to apply to the court "thereanent down to" a date which was the sixteenth birthday of the younger infant. The condescendence in the action stated: "About the end of March, 1944, the pursuer ascer- "tained that, in view of the proceedings in the Chancery Court, "it was impossible for the children to leave or be taken from "England to Scotland without the permission of the Chancery "Court. He believes and avers that it is not in the best "interests of the children that they should be precluded from "visiting Scotland . . . . He accordingly desires . . . . that "the custody of the children should be awarded to him in this "action." By this summons the father asked to be at liberty to apply for custody to the Court of Session and to carry into effect any directions which that court might give. In his affidavit in support of the application he said: "I am advised "by my Scottish solicitors and believe that the Court of Session "has jurisdiction to deal with the custody, maintenance and "welfare of my children in the pending divorce proceedings, "but that in view of these present proceedings such court "might feel a difficulty in exercising such jurisdiction. "I respectfully submit that it would be for the benefit of my "children that their future custody and upbringing should be "dealt with by the Court of Session as the court of their domicile "rather than by this Honourable Court, and that the dupli- "cation of proceedings is an inconvenience and expense which "cannot benefit anyone." At the hearing, which was in chambers, he asked, alternatively, that each parent might be given leave to make applications in relation to the infants in Scotland, whether in the proceedings there pending or otherwise, notwithstanding the pendency of the proceedings in England.

Gray K.C. and *Tatham* for the father.
Raymond Jennings for the mother.
Harmsworth for the infants.

The trustees were represented by a solicitor at the hearing in chambers.

Cur. adv. vult.

1944. Nov. 13. VAISEY J., sitting in open court, read a judgment in which he stated the facts and continued: There is not, so far as I can see, the slightest chance of the children being "precluded from visiting Scotland," and as to the requirement of this court's permission, the circumstances are such that this court might well give a general permission for them to move freely between England and Scotland, and the innuendo, if such it be, of the pleading that this court would somehow be prejudiced in favour of their remaining in England and be likely to obstruct their visiting Scotland, is baseless. As to the father's statement that he was advised that the Court of Session "might feel a difficulty" in exercising its jurisdiction, I must say that this kind of vague hearsay is not, in my judgment, at all the proper way in which to inform this court of a point of Scottish law and practice, and I do not see that I can pay any attention to it. I certainly do not conceive it to be any part of my duty to presume to instruct the judiciary of Scotland as to the degree or measure of the regard which ought in that country to be paid to the circumstances in which these infant children are placed as wards of this court. It may be, I do not know, that the pendency of the Scottish action places them in a somewhat similar position in the eyes of the Scottish court. With regard to what the father says about the duplication of proceedings being an inconvenience and expense, I will say only that, if this had been an application in which that issue, the issue of the forum conveniens, had been properly raised, which it is not, I might have had to deal with it. As it is, I say nothing whatsoever about it. I cannot, however, pass by without comment the implication that this court is likely to take less care than would the courts in Scotland to ensure that the Scottish associations of these children shall be most fully and scrupulously maintained and preserved.

I do not see my way to grant to the father the relief which he seeks by this summons or any modified form of it. I am, indeed, not quite sure that it would not be discourteous to the courts of Scotland, at least in appearance, if I were to do so. If the father pursues his present application with regard to the custody of the children or makes any other application in Scotland concerning them, and if the courts of Scotland should think proper to make, and do make, any order or orders with regard to these children, then that order or those orders will, as I understand the matter, most certainly receive in the courts of this country the fullest respect and attention, in accordance with the principles laid down by the House of Lords in *Stuart* v. *Bute* (*Marquis*) (1): see also and compare *In re B——————'s Settlement* (2). This court has not made, it has not even been asked to make, any order with regard to these infants. Had it done so, its order would have received a corresponding measure of respect and attention in the courts of Scotland. Of that I entertain no doubt. The care and protection of infants who, by reason of the dissensions of their parents or otherwise, are in need of care and protection is exercised for and on behalf of the Sovereign as parens patriæ by the courts of England and the courts of Scotland concurrently, with the sole desire of seeing that this important duty is effectively discharged. Conflict between those two courts is entirely out of the question. Each acts in the manner which it considers right as occasion arises. Neither court is avid of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted. In the present case it may, I do not say that it will, be for the benefit of the infants that orders should be made in the courts of both countries, but, if so, those orders will always be complementary and not contradictory in character.

I am quite prepared to assume that the father's application was, in part at least, actuated by a desire to avoid any appearance of disrespect to this court, but the only order which I shall make on his application is that the costs of the infants and of the trustees shall be their costs in the action. I make no order as to the costs of either the father or the mother. The attention of the courts in Scotland will, no doubt, be drawn to what I have said and, so far as I am concerned, there is no objection to the lifting in those courts of the veil of anonymity behind which, on this occasion, I have concealed the identity of the parties.

Solicitors: *Maples, Teesdale & Co.*; *Gordon, Dadds & Co.*

(1) (1861) 9 H. L. C. 440, 464, 470. (2) [1940] Ch. 54.

K. R. A. H.

C. A.

1944

Oct. 17, 18, 19; Nov. 9.

Lord Greene M.R., Finlay and Morton L.JJ.

In re FITZHARDINGE'S LEASE.

Emergency legislation—War damage—Multiple lease—Disclaimer—Retention—Lease of house with mews—Mews subsequently converted into dwellings—House rendered unfit for habitation by war damage—Notice of disclaimer—Application for leave to disclaim house only and retain dwellings in mews—Jurisdiction—Landlord and Tenant (War Damage) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 72), *s.* 15, *sub-ss.* 3, 4 (*as modified by the Landlord and Tenant* (*War Damage*) (*Amendment*) *Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 41), *sch.*)

Where a tenant has given notice of total disclaimer or total retention in regard to a multiple lease by reason of one or more of the separate tenements having suffered war damage, it is still open to him to apply to the court under s. 15, sub-s. 4, of the Landlord and Tenant (War Damage) Act, 1939, as modified by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 2, sub-s. 5, and set out in the schedule, for leave to exercise the right of disclaimer or retention of part only of the premises comprised in the lease, and the court has jurisdiction to entertain such an application even though the landlord has expressed his willingness to accept the notice of total disclaimer.

On its true construction s. 15 does not compel the court to consider separately and in order the questions arising under sub-ss. 3 and 4, so that, in a case where the tenant has given a notice of total disclaimer, which the landlord is willing to accept, and then applied for leave to disclaim in part only, the court will not be debarred from holding under s. 15 that the real equity is to allow the tenant to disclaim in part under sub-s. 4 in preference to making an order for total disclaimer under sub-s. 3. The court must consider together the various courses open to it, having regard to the nature of the application or applications before it and the circumstances established by the evidence, and decide which of the various orders open to it to make to satisfy the justice of the case.

APPEAL from Uthwatt J. (1).

By a reversionary lease, dated January 11, 1889, the lessor, the Rt. Hon. Francis W. Fitzhardinge, demised 14 Charles Street, W., together with coach house, stable erections and buildings fronting on Hays Mews, to Roderick Mackenzie for the term of forty-three and a quarter years from the termination of a previous lease on September 29, 1908, at the yearly rent of 140*l*. In 1931 Miss Mackenzie, who had become the tenant of the property under the lease, converted the coach house, stable erections and buildings into two flats and a garage, which, with a small garden in the rear thereof, were known as 12 Hays Mews and were separated from 14 Charles

(1) [1944] W. N. 159.

Street and the land enjoyed therewith. On May 10, 1941, war damage occurred to 14 Charles Street rendering it unfit for occupation. On May 10, 1943, Samuel Estates, Ld., having become the landlords, served on the tenant a notice to elect under the Landlord and Tenant (War Damage) Acts, 1939 and 1941. On May 20 the tenant's solicitors served on the landlords a notice of disclaimer of the lease accompanied by a letter stating that the tenant was about to apply under s. 15 of the Act of 1939, as modified by the Act of 1941 (1), for

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(1) By s. 15 of the Landlord and Tenant (War Damage) Act, 1939 (as modified by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, sch.): " . . . . " (2) Where a notice of disclaimer, " a notice of retention or a notice " to elect is served with respect to " the lease—(*a*) the person " serving the notice or the person " on whom it is served; or (*b*) any " other person having an interest in " the reversion immediately expectant on the determination of " the lease; may apply to the " court, within one month of the " notice, to determine the question " whether the tenant should be " allowed to exercise the right of " disclaimer or retention, either as " respects the lease as a whole or " as respects one or more of the " separate tenements comprised " therein, or should not be allowed " to exercise that right at all."

" (3) If on such an application " the court is satisfied that, having " regard to the extent of the war " damage suffered by the land " comprised in the lease as a whole " and all the circumstances of the " case (including any offers made " by the landlord for an extension " of the term of the lease or for " an alteration of the rent reserved " thereby or for any other modification of the terms of the lease) " it is equitable to allow the " tenant to exercise the said right " in respect of the lease as a whole, " the court shall give a direction " accordingly, and any notice of " disclaimer or retention already " served shall have effect under " this part of this Act . . . ."

" (4) If on such an application " the court, having regard to the " matters referred to in the last " foregoing subsection, is not satisfied that it is equitable to allow " the tenant to exercise the right " of disclaimer or retention as " respects the lease as a whole, but " is satisfied that it is equitable to " allow him to exercise the said " right as respects one or more of " the separate tenements comprised therein (hereafter referred " to as 'the disclaimable tenements') the court—(*a*) shall " order that the lease shall be " treated as if it were two separate " leases, one comprising the disclaimable tenement or tenements, and the other comprising " the remainder of the tenements; " and (*b*) shall give such consequential directions as to the " apportionment of the rent and " otherwise as it thinks just, " including directions as respects " any sub-lease comprising a disclaimable tenement and a tenement which is not disclaimable; " and (*c*) shall order that the " tenant shall be at liberty to " serve a notice of disclaimer or " retention as respects the lease " comprising the disclaimable " tenement or tenements but not

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an order declaring it equitable that she should be allowed to disclaim as to 14 Charles Street only and to retain 12 Hays Mews. On June 3, 1943, this application was made in the county court and on July 5, 1943, the proceedings were transferred to the High Court. The landlords desired to obtain possession of all the premises comprised in the lease with a view to developing the property as a whole, and they, therefore, opposed the application. They had made offers of pecuniary compensation to the tenant. Uthwatt J. held that the lease was a multiple lease within s. 15 of the Act of 1939, as modified. In his view, the general intention of that section clearly was that, failing an order allowing disclaimer or retention of the whole premises under sub-s. 3, the case might be considered under sub-s. 4 to decide whether it was equitable to allow the tenant to exercise the right of partial disclaimer or partial retention. The tenant was not precluded by her notice of disclaimer from asking to be allowed to make a partial disclaimer only, and it was equitable to allow the tenant to exercise the right of disclaimer or right of retention as she thought fit. The lease should be treated as two separate leases, one comprising 14 Charles Street and the other 12 Hays Mews. He would apportion the rent attributing 95*l.* to 14 Charles Street and 45*l.* to 12 Hays Mews. The landlords appealed.

Roxburgh K.C. and *Heathcote-Williams* for the landlords. Section 15 of the Landlord and Tenant (War Damage) Act, 1939, as modified by the amending Act of 1941, does not confer on a tenant under a multiple lease any right of partial disclaimer which is nowhere conferred on him in respect of any other lease. The broad object of the section is to enable the court to fetter the right of total disclaimer by the tenant if

" as respects the other lease; and " (*d*) where a notice of disclaimer " or retention has been served " (whether in compliance with a " notice to elect or not), shall order " that the notice shall be of no " effect . . . ."

" (5) If on such an application " the court, having regard to the " matters referred to in sub-" section 3 of this section, is not " satisfied that it is equitable to " allow the tenant to exercise the " right of disclaimer or retention as " respects the lease as a whole or " as respects one or more of the " separate tenements comprised " therein, the court shall direct " that the land comprised in the " lease shall not be deemed to be " unfit for the purposes of this " Part of this Act and that any " notice of disclaimer, notice of " retention or notice to elect " relating thereto shall cease to " have effect . . . ."

the landlord so requires. The grounds on which this submission is made are as follows. First, it is a condition precedent to any proceeding under s. 15 that a notice to elect, a notice of disclaimer, or a notice of retention, should have been given. It is true that here the notice of disclaimer of the lease was accompanied by a letter to say the tenant was not disclaiming the whole of the lease if she could avoid it, but it would be very strange if the legislation intended to create a power for a tenant to disclaim in part after he has disclaimed the whole lease. Secondly, either party can apply under s. 15, and sub-s. 2 has an instruction that the court should consider the whole position. Sub-section 2 provides that the court is to determine " whether the tenant should be allowed to " exercise the right of diclaimer or retention, either as respects " the lease as a whole or as respects one or more of the separate " tenements comprised therein," and Uthwatt J. spelt out of this a right of partial disclaimer by the tenant with the leave of the court. That might be a possible view of sub-s. 2 alone, but under sub-s. 3 the first duty imposed on the court is to decide whether it is equitable to allow the tenant to exercise the right to disclaim the lease as a whole. Under that subsection it follows that, this tenant having disclaimed the whole lease, the landlords have a right to hold her to it, at any rate, if it be thought equitable. Uthwatt J. ignored this and passed on to sub-s. 4, but it is a condition precedent to the court's allowing partial disclaimer under that subsection that the court should be satisfied that it is not equitable to allow the tenant to make a total disclaimer. Lastly, under sub-s. 5, the court can direct that the land comprised in a lease is not to be deemed unfit if it be satisfied that no right of disclaimer in whole or in part ought to be allowed. It follows that under this section the court is seised of the whole matter on the application of either party, but that sub-ss. 3, 4 and 5 have to be dealt with in succession so that, if the court is satisfied that an order can properly be made under sub-s. 3, it does not consider the matter under sub-ss. 4 and 5. The Act must be read distributively. If there has been a notice of disclaimer, the court cannot consider retention ; and if there has been a notice of retention, the court cannot consider disclaimer. The whole section, apart from sub-s. 2, shows an intention to fetter a tenant rather than to confer rights on him.

Wynn Parry K.C. and *Squibb* for the tenant. It is made

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clear by the opening words of s. 15 that it is dealing with a special case. In the general case, where the entirety of the interest and the premises are dealt with together, the tenant is given one of two rights. He may serve either notice of disclaimer or notice of retention. The landlord can serve a notice of election, and, if the tenant does not comply, a certain result automatically follows. Provision is made under s. 6 for application to the court. The only question for the determination of the court is "whether the notice was of no "effect on the ground that the land was not unfit." There is no question under s. 6 whether any person is to be allowed to exercise any right. The right of the tenant to serve either of his notices is in no way fettered. Again, the right of the landlord is of the same nature as the right given him by sub-s. 3, an indirect right. The court is dealing with documents containing no right to one party to determine the lease at his option before the end of the term without the consent of the other. Owing to the war, Parliament has given to the tenant, and to the tenant only, a right in certain circumstances to determine the lease. The landlord's rights are not direct rights. All that he is given is reasonable protection, having regard to the statutory rights given to the tenant. Returning to the special case under s. 15, the overriding object of that section was to deal with a case where the premises comprised in a particular lease lent themselves to a different form of treatment. The definition of multiple lease postulates a case where the buildings might reasonably have been made the subject of a number of leases, and the legislature is contemplating a way of dealing with this situation. In sub-s. 2 there is an immediate indication of how the legislature is proceeding. The section shows signs of great compression, it is an omnibus provision designed to deal with all the various types of question which might be expected to arise. It puts in the forefront the necessity of an application to the court, because, if the lease is to be treated as a multiple lease, there must be an order of the court saying that it is to be so treated, but that is not sufficient because there are other people affected besides the tenant. The method of s. 6 is completely departed from, and the question for the court is whether the tenant should be allowed to exercise a right. The right is referred to in "telescoped" language as "the right of disclaimer or "retention," though, as appears from s. 4, they are two separate rights. What is achieved is the creation of a new right

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(additional to what the tenant would have had in the case of an ordinary lease) to disclaim part of the lease. The legislature is trying to specify the various courses which various named persons may want to follow. The only person who can choose the course is the tenant, and anyone else must show that the tenant is seeking to exercise a right which he ought not to be allowed to exercise. The basis of the jurisdiction is that the tenant is seeking to exercise a right. The right of partial disclaimer might be worth very little if the court had first to consider whether the tenant should be allowed to exercise a right which he had no desire to exercise, namely, that of total disclaimer.

Roxburgh K.C. replied.

Cur adv. vult.

Nov. 9. FINLAY L.J. read the judgment of the court which had been prepared by the Master of the Rolls. The first questions which arise on this appeal are whether or not, on the true construction of the relevant statutory provisions and in the light of the relevant facts, Uthwatt J. had jurisdiction to make the order now under appeal, and, if so, what are the principles on which he should have acted. These questions turn primarily on the language of s. 15 of the Landlord and Tenant (War Damage) Act, 1939, which, as modified by s. 2, sub-s. 5, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, is set out in the schedule to the latter Act. That section is found in a fasciculus of sections grouped under the heading: "Special provision as to certain leases," and it deals with a type of lease in regard to which the main provisions of the Act by themselves were clearly unsuitable and inadequate. Leases of the type in question are those which fall under the following definition of a multiple lease contained in s. 24 of the Act of 1939. "'Multiple lease' "means a lease comprising buildings which are used or "adapted for use as two or more separate tenements." The reasons for making special provision for leases of this type are sufficiently obvious. Many buildings, industrial, commercial or residential, are used or adapted for use as two or more separate tenements. A factory comprising several buildings or shops, a building containing a number of flats or offices, are simple examples. In the case of buildings of this type war damage may affect part only, e.g., one of several factory buildings or some out of a number of flats or offices. Under the general provisions of the legislation the only right given to a tenant is to serve a notice, either of disclaimer or retention, in respect of the whole lease. Similarly, a notice to elect served by the landlord only relates to the whole lease in that it calls on the tenant to serve either a notice of disclaimer or a notice of retention, each of which, ex hypothesi, can only relate to the whole lease. In the event of a question arising as to the validity of a notice, the court has no power under the general provisions to treat the lease otherwise than as a single whole. These provisions, if they had been left to govern the case of multiple leases, would, in many instances, have led to injustice or inconvenience. A tenant might quite properly desire to keep the undamaged part of the property. If he could only have done this on the terms that he should retain the whole lease serious hardship would have been involved. Similarly, from the landlord's point of view, to allow a tenant to disclaim the whole lease when a substantial part of the property was undamaged might have resulted in penalizing the landlord for the benefit of a tenant anxious to rid himself of the burden of the lease. It was to meet this state of affairs that s. 15 was inserted in the Act. It is important to observe at the outset that its object is quite clearly to protect impartially both parties to the lease, and it is, in our opinion, quite wrong to interpret it on the assumption that its primary object is to protect the landlord against the tenant or the tenant against the landlord.

The machinery adopted by the legislature to secure the desired result is worth examination. It did not, as, perhaps, it might have done, create a new type of notice which a tenant could serve covering part only of the demised premises. The form of notice remains the same as in the case of leases which are not multiple leases. Subject to the provisions of s. 15, sub-s. 4 (*c*), the only notices that can be served in the case as well of multiple leases as of ordinary leases are still what have conveniently been called notices of "total disclaimer" and "total retention." There is no such thing as a notice of "partial disclaimer" or "partial retention." Similarly, no change is made in the notice to elect. It remains a notice to elect between total disclaimer and total retention. The next matter to notice is that the jurisdiction of the court under the section only arises when a notice, whether by the tenant or by the landlord, has been served. These notices, as we have pointed out, can only be "total" notices, and it follows that, whenever a tenant who has served a notice is contending before the court that the proper solution is to give him the right of partial disclaimer or partial retention, he is necessarily asking for relief inconsistent with the terms of his notice. This is important in view of the argument addressed to us on the question of jurisdiction, which was as follows. It was said that the tenant in the present case, having served a notice of disclaimer which the landlord was willing to accept, was precluded from asking the court to give her a right of partial disclaimer, and that the court, accordingly, had no jurisdiction to entertain her application. The proper course, it was said, for a tenant to take who is desirous of disclaiming in respect of part only of the demised premises is to wait until the landlord serves on him a notice to elect and then make his application under the section. There are, in our opinion, three convincing reasons for rejecting this view. First, the section itself in terms provides that an application may be made by a tenant who has served a notice of disclaimer which, as has already been pointed out, can only be a total notice, and, under sub-s. 4 (*d*), where the court decides in favour of partial disclaimer it must order that a notice of disclaimer already served (which can only be a "total" notice) shall be of no effect. Secondly, the argument, if valid against the tenant, must also be valid against the landlord who has served a notice to elect. The election demanded by such a notice is, as we have pointed out, a "total" election. If, therefore, a landlord who wishes to limit his tenant to partial disclaimer serves a notice to elect and the tenant complies with it by serving a notice of disclaimer, the landlord, according to the argument, could not apply to the court to limit the tenant to partial disclaimer since the tenant, by serving his notice of disclaimer, would have been taking one of the very two alternatives between which the landlord by his notice was calling on the tenant to choose. The third reason is that to compel the tenant to wait until the landlord serves a notice to elect might involve the tenant in the gravest hardship. A tenant in the case of a multiple lease will normally want to know what his position is at the earliest possible moment. Can he (if he so desires) disclaim the lease as regards the whole of the demised premises? Can he (if he so desires) retain it as regards part? Must he (perhaps against his will) retain the whole?

According to the interpretation which, in our opinion, is the correct one, he can at his own instance give the court jurisdiction to decide these questions by himself serving one of the only two types of notice which are open to him. If he has to wait for the landlord to serve a notice to elect before the court can entertain an application (as, on the argument, he would be bound to do) he may be left in a state of uncertainty as to his position for an indefinite period since there is no time limit for service of a notice to elect, and the right to obtain a decision from the court will be dependent on the action of his landlord who may, for reasons of his own, prefer to leave matters as they are. Indeed, the landlord would in many cases (according to the argument) be in a position to force the tenant to serve a notice which, if accepted by the landlord, would deprive the tenant of any right thereafter to ask for any relief under the section. We come, therefore, to the clear conclusion that a tenant who has served a notice of disclaimer is nevertheless entitled under the Act to apply to the court for leave to make a partial disclaimer. The fact that in the present case the notice of disclaimer was served after the landlord had served a notice to elect does not appear to us to make the slightest difference.

Having, correctly as we hope, disposed of this argument on jurisdiction, we can now turn to the main contention advanced on behalf of the landlords which relates to the principles on which the court should act. We find it a little difficult to grasp, but it is, as we understand, to the following effect. It is said that the court must proceed to deal with any application that comes before it by steps. By this it is meant that the court must first, under sub-s. 3, consider whether it is equitable to allow the tenant to exercise the right of disclaimer or retention (as the case may be) in respect of the lease as a whole. Consideration to this question must, it is said, be given without reference to the question whether or not it would be equitable to allow the tenant to disclaim in part. This latter question, it is said, can only be examined by the court under sub-s. 4 when it has failed to be satisfied that it is equitable to allow the tenant to disclaim as to the whole. It is conceded that, according to this argument, the court might be compelled, e.g., to limit the tenant to total disclaimer as being " equitable " notwithstanding that the allowance of partial disclaimer would on the facts be more " equitable." When the matter is being considered under sub-s. 3, it is said, the court has no power to examine the comparative merits, from the point of view of equitableness, of total disclaimer, on the one hand, and partial disclaimer, on the other. It can only consider the equitableness of total disclaimer, and, if satisfied as to that, the only order that the court has power to make is an order allowing total disclaimer under sub-s. 3. Applying these proposition to the facts of the present case, Mr. Roxburgh argued that they necessarily led to a decision in his favour. Here, he said, is a tenant who, as his notice of disclaimer shows, wishes to be able to disclaim the lease as a whole. His landlord is willing to agree. It cannot, therefore, be otherwise than equitable to allow total disclaimer, and that is an end of the matter since judicial investigation never reaches the stage of considering the equitableness of allowing partial disclaimer under sub-s. 4. Accepting for a moment (contrary to our own view) the propositions on which this branch of the argument is based, we would point out that it assumes that the court is bound to treat the notice of disclaimer as expressing in a binding manner the real wishes of the tenant since, if that is not the case, the agreement of the landlord to the notice clearly cannot establish the equitableness of limiting the tenant to total disclaimer. The argument would only prevail if the parties both agreed on total disclaimer which, ex hypothesi, is not the case. Once it is made clear that a tenant can ask for partial disclaimer notwithstanding that he has served a notice of total disclaimer, it cannot be said that the landlord's concurrence in total disclaimer establishes the equitableness of that course. It may also be pointed out that the argument involves placing a curious construction on the word "allow" since, if it is to be accepted, the court would be "allowing" the tenant to do something that he does not want to do.

But the wider ground on which, in our opinion, the whole argument fails is that the propositions submitted by Mr. Roxburgh as to the procedure to be followed under the section cannot be supported. They are in any event unattractive in themselves since they impute to the legislature an intention to require on the part of the court a highly artificial and unsatisfactory mental process. According to the argument, the court would be bound to confine the tenant's right to that of total disclaimer once it found that this course was equitable notwithstanding that it could see perfectly well that on the facts partial disclaimer would be more equitable. The court would be bound to shut its eyes. Of course, if the language of the section leads to this result effect must be given to it, but, in our opinion, it does not, as an examination of its structure and language will show. The first thing to notice about the draftsmanship of the section is that it is very tightly compressed. The draftsman had to deal with a large number of possible permutations and combinations, so to speak, and his task was to find language which would cover all of them. Thus, the landlord might be claiming that the premises were not unfit and the tenant might be asking for total disclaimer, or, alternatively, partial disclaimer. Again, the tenant might be asking for total retention and the landlord might be saying that it was a case for partial retention only, and so forth. To meet this situation either party is empowered to apply to the court and his application may clearly be for whatever form of relief he prefers among the various alternatives open to him. This appears to us to be the effect of the governing words in sub-s. 2, under which the party serving or the party served (or, as it may be, both of them) may apply to the court "to "determine the question whether the tenant should be allowed "to exercise the right of disclaimer or retention, either as "respects the lease as a whole or as respects one or more of "the separate tenements comprised therein, or should not be "allowed to exercise that right at all." The application or applications according to its or their nature may raise all or some or one only of these alternatives for determination. Sub-sections 3 and 4 contain directions to the court as to the form of order to be made in each of the alternative cases there mentioned, viz.: under sub-s. 3 total disclaimer, total retention: under sub-s. 4 partial disclaimer, partial retention. The language used in these sub-sections is clearly intended by the draftsman to be sufficiently comprehensive in its terms to cover all the various permutations and combinations above mentioned. In a compressed piece of drafting of this description it is almost inevitable that the language will prove to be in some respects unsatisfactory. Under the section the court may have before it either an application by one party or cross-applications by both. It may also have before it an application by an interested party under sub-s. 2 (*b*), but for the sake of simplicity we will ignore that case. As an example of what would happen if the argument for the landlords were accepted we will take the case where a tenant is applying for leave to make a partial disclaimer and the landlord is asserting that the only right which the tenant ought to be allowed to exercise is that of total retention. In such a case it would manifestly be impossible to make an order under sub-s. 3 on the tenant's application since the only order possible under that section in respect of disclaimer is one permitting total disclaimer. On the landlord's application there would presumably be jurisdiction to make an order " allowing " the tenant to exercise the " right " (a word which includes both disclaimer and retention) of total retention. Such an order would, according to the argument, by implication exclude any right on the part of the tenant to disclaim in part, and could only mean that the right of total retention is to be the only right which he is to be allowed to exercise. In making such an order the court would, according to the argument, never have taken into consideration the question which the tenant desired to raise under sub-s. 4, namely, the equitableness of partial disclaimer. Once the court had taken the view on the landlord's application that it was equitable to confine the tenant to total retention the question whether partial disclaimer would in the circumstances be the more equitable course would not arise. The tenant's application would never be heard and any evidence tendered by him on the landlord's application with a view to showing that partial disclaimer would, in the circumstances, be the more equitable course would of necessity be excluded as irrelevant. A construction which can lead to such a result (and many other examples could be given) appears to us to be singularly unattractive and speaking for ourselves, we should find difficulty in going through the mental processes which it would impose on the court. The argument is, in our opinion, founded on a misinterpretation of the language of the section and a failure to realize the nature of the problem of draftsmanship involved when a large variety of possible cases is dealt with by compressed and all-inclusive language. The mistake, in our opinion, lies in treating the various examinations which the court is directed to undertake by sub-s. 3 and 4 as being successive in point of time and divided, so to speak, into water-tight compartments. The true view, in our opinion, is that the court must consider together the various courses open to it, having regard to the nature of the application or applications before it and the circumstances established by the evidence. It must then decide what is the equitable course to take and order accordingly. The different possible orders are (as it appears to us) dealt with in separate sub-sections for convenience in order to set out the form of order which the court is to make according as it takes the one view or the other. This construction leads to a fair and sensible

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result, and enables the court to decide which of the various orders open to it to make will satisfy the justice of the case. It avoids the necessity of imposing on the court the duty of making an order which is in itself equitable without considering whether a different order would in the circumstances be more equitable. The conception of degrees of equitableness is one which we have difficulty in understanding. We should have thought that it would be impossible for an order allowing only total retention (in the example given) to be equitable if the more equitable course would be to allow the tenant to disclaim in part. If it is equitable to give the tenant this right we cannot see how it can be at the same time equitable to confine him (as in the example given) to total retention. The one excludes the other.

The controversy in the present case lay between the claim of the tenant to be allowed to disclaim in part and the claim of the landlord that the tenant should only be allowed to disclaim the whole. In our opinion, applying the principles which appear to us to be correct, the duty of the court is to take into consideration the extent of the war damage and the other circumstances of the case as directed by the section and then to decide which of the two claims is to be preferred from the point of view of equitableness. Uthwatt J. held that he had jurisdiction to entertain the application of the tenant and decided in her favour on the merits. The next question which arises on the appeal is whether in so deciding he applied the correct principles as above laid down. At the request of the parties we did not hear argument on this question since they wished to have an opportunity of considering their position in the light of our decision on the questions of principle.

The case then stood over.

Dec. 10. Counsel informed the court that the parties had agreed on an adjustment of their differences in the light of the principles above enunciated and accordingly all further proceedings in the appeal were stayed.

Solicitors: *Waltons & Co.; Mead, Sons & Bingham.*

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In re BLAKE.

CLUTTERBUCK *v.* BRADFORD.

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Nov. 27, 28.
Lord Greene M.R., Finlay L.J. and Uthwatt J.

Solicitor—Charging order—Costs—"Property recovered or preserved" Order for costs made on originating summons—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.

Where, on a summons for the construction of a will, an order is made for the payment of a party's taxed costs out of the residuary estate, that party's solicitors are, in the absence of any exceptional circumstances, entitled to obtain a charging order under s. 69 of the Solicitors Act, 1932, on the amount of the taxed costs as property recovered.

Dallow v. *Garrold* (1884) 14 Q. B. D. 543 followed.

It is not necessary that property as well as costs should be recovered to entitle the successful litigant's solicitors to a charging order extending to costs. Nor does it make any difference that the order for payment of costs was made on an originating summons issued for the construction of a document.

Prima facie a solicitor is entitled to a charging order if he satisfies the requirements of s. 69, and, where no conduct of his is involved, it would require very exceptional circumstances to justify the court in refusing an order. The fact that a hardship would be caused to the residuary legatees who had obtained on an earlier application an order for payment of their costs by the party was immaterial.

Appeal from Vaisey J. (1).

In proceedings for the administration of the estate of the testatrix, Eliza Flora Blake, an order was made on June 3, 1942, for an inquiry as to debts and a master's certificate was made in the inquiry disallowing a claim by Colonel Fiennes William Edward Blake against the estate for 1,700*l.* On a summons by Colonel Blake asking that the certificate might be discharged or varied, the court made no order except that he was to pay to the defendants, residuary legatees under the testatrix's will, their taxed costs of the application amounting to 39*l.* 10*s.* 5*d.* Subsequently, on a summons dated April 29, 1943, and taken out by the executors and trustees of the testatrix's will, a declaration was made that Colonel Blake had ceased to be entitled to a legacy bequeathed to him by the testatrix owing to a stringent condition attached to it against raising questions, and it was ordered that the taxed costs of all parties (including Colonel Blake) as between solicitor and client should be paid out of the testatrix's estate. Colonel

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(1) [1944] W. N. 221.

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Blake's costs were taxed at 38*l.* 13*s.* 3*d.*, but they had not yet been paid. On July 7, 1944, the residuary legatees obtained a garnishee order nisi against Colonel Blake in respect of the taxed costs due from him under the earlier order. By summons, dated July 12, 1944, the applicants, Messrs. Warren & Warren, who had been Colonel Blake's solicitors in both proceedings, applied for a charging order on the sum of 38*l.* 13*s.* 3*d.* due to Colonel Blake for taxed costs out of the residuary estate of the testatrix as property recovered or preserved within s. 69 of the Solicitors Act, 1932. Vaisey J. dismissed the application, holding that while costs recovered in an action as part of a total sum payable in respect of a judgment debt, were treated as recovered in the action as was made clear in *Dallow v. Garrold* (1), the words of s. 69 of the Solicitors Act, 1932 were not appropriate to a mere direction that the taxed costs of a litigation should be paid out of an estate: *In re Viney's Trusts* (2) and *Higgs* v. *Higgs* (3). There had, therefore, not been a recovery or preservation of property so as to entitle the applicants to a charging order. The applicants appealed.

Aronson for the applicants. Vaisey J. was wrong. Section 69 of the Solicitors Act, 1932, makes no material change in the previous enactments, the authorities on which are still good law. In *Dallow* v. *Garrold* (4) there was a debt as well as costs, but in *Johnston* v. *McKenzie* (5) Gibson J. said: "That "the costs of a successful litigant in a personal action, or in "an action where no property was recovered or preserved "would be 'property recovered' appears to be decided by "*Dallow* v. *Garrold* (4). The language may not be very apt "for the purpose, but it would seem unlikely that in the "very case of all others where the solicitor required protection, "there being no property preserved, the costs which he had "earned should be left out of the statutory remedy." There is nothing in the section to say that the client must be richer as the result of the proceedings, and there are many cases in which nothing except costs can come to the hands of the successful party. [He referred to *In re Turner* (6); *Higgs* v. *Higgs* (3); *In re Viney's Trusts* (2).]

Myles for the residuary legatees. It is submitted (1.) that

(1) (1884) 14 Q. B. D. 543.
(2) (1868) 18 L. T. 851.
(3) [1934] P. 95.
(4) (1884) 13 Q. B. D. 543; in C. A. 14 Q. B. D. 543.
(5) [1911] 2 I. R. 118, 127.
(6) [1907] 2 Ch. 126.

for the present purpose an order on an originating summons for costs out of an estate does not stand on the same footing as an order against an individual in a hostile action ; (2.) that the granting of a charging order under s. 69 is discretionary, and ought not to be made in this case. The court ought not to exercise its discretion in favour of a party's solicitors so as to cause hardship to others. Here a special hardship would be caused to the residuary legatees who had already obtained a garnishee order nisi before the present application was made : see *Higgs* v. *Higgs* (1) which is closest to the present case and there a charging order was refused. Again, the applicants have not been instrumental in recovering or preserving property as required by s. 69, and the cases that have been cited go no further than to show that where property has been recovered or preserved the solicitor's charging order will extend to the costs as well : see *Dallow* v. *Garrold* (2). *Johnston* v. *McKenzie* (3) is not really against this view.

LORD GREENE M.R. This appeal raises a question of considerable importance to solicitors. Under s. 69 of the Solicitors Act, 1932, the court is empowered to declare a solicitor entitled to a charge on property recovered or preserved through his instrumentality for payment of his taxed costs in reference to the suit, matter or proceeding. There has been no substantial change throughout the history of legislation relating to solicitors' charging orders. It is said on behalf of the applicant solicitors that, although the only order which Colonel Blake obtained in the second proceeding was for payment of his costs out of the residuary estate, nevertheless they are entitled to a charge on those costs as being "property recovered" through their instrumentality. As against this it is said on behalf of the residuary legatees that where there is a judgment for costs alone and none for the recovery of some specific property or damages, the section does not apply. As an alternative argument it is said that costs granted on an originating summons stand on a different footing from those awarded in what is described by Mr. Myles as "hostile "litigation." Whether or not I should have thought that costs could be described as property recovered if the question had come up for the first time, the matter, in my opinion, is settled by the authority of *Dallow* v. *Garrold* (2) which came

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(1) [1934] P. 95.
(2) 14 Q. B. D. 543.
(3) [1911] 2 I. R. 118.

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before this court in 1884. There a judgment had been obtained for a sum of money and costs and a fi. fa. had been issued on behalf of the successful plaintiff. The sheriff had money in his hands under the fi. fa. and a garnishee summons had been issued by a judgment creditor of the plaintiff with a view to attaching that money in the hands of the sheriff. The solicitor for the plaintiff then applied for a charging order against, not merely the sum recovered under the judgment, but also the sum representing the costs awarded to his successful client. The question, therefore, clearly arose whether he was entitled to a charging order insofar as it related to the sum recovered by the sheriff in respect of costs. In the argument (1) this point was taken : " Sixthly, the money held by the sheriff was " in a great measure recovered for Dallow's costs. Therefore " the sum attached by the solicitor was made up chiefly of " money representing costs. Costs are not ' property ' such " as a solicitor can attach under the Act. That which a " plaintiff recovers for another and in order to pay another's " work, cannot be his ' property '." That was the argument, and it raised the present point as neatly as could be. If it had been accepted the charging order would have been confined to the amount of the substantive judgment to the exclusion of the amount recovered in respect of costs. That contention was dealt with by Lord Esher M.R. who said (1) : " This case " has been ingeniously argued, and it has been contended that " although a judgment for debt and costs has been obtained " through the instrumentality of a solicitor, nevertheless he " has no title to a charging order, and that the sum of money " recovered for costs is not ' property ' within the meaning of " 23 & 24 Vict., c. 127, s. 28. But it is something which has " been recovered, the debt and the costs were originally in the " hands of the judgment debtor, and were recovered from him " through the writ of fieri facias issued to the sheriff." That seems to me to be a clear decision that the debt and the costs were both of them properly described as " property recovered." If the true view were that costs are not " property recovered " I cannot see how their position could be improved or altered by the fact that in addition to the judgment for costs there was a substantive money judgment. That fact could not turn into " property recovered " that which in its nature was not property recovered.

It has been argued by Mr. Myles that the present case is

(1) 14 Q. B. D 545.

distinguishable, and that the authority of *Dallow* v. *Garrold* (1) only covers a case where in addition to the judgment for costs there is a judgment for the recovery of some specific property or sum of money. I cannot accept any such distinction. It seems to me that when once it has been decided, as in *Dallow* v. *Garrold* (1), that costs are capable of being " property " recovered," the principle must inevitably cover the case where costs are the only subject-matter of the judgment. It is to be noticed that the language of the Master of the Rolls is specifically directed to that question. Let me read it again. " It has been contended . . . . that the sum of money " recovered for costs is not ' property ' within the meaning of " the Act. " But it is something which has been recovered." That is a clear statement of opinion and that authority has stood for many years. It is true that in *Johnston* v. *McKenzie* (2) the Lord Chief Justice in Ireland expressed some hesitation in approving that principle, but in fact he followed *Dallow* v. *Garrold* (1) and *Johnston* v. *McKenzie* (2) does not seem to me to be an authority against the present applicants. If anything, it is in their favour because the Lord Chief Justice followed *Dallow* v. *Garrold* (1).

Those are the two cases which I think worth referring to in this connexion, but I would like to point out the remarkable results which would follow if Mr. Myles' argument were right. Let me take two examples. A plaintiff seeks an injunction to restrain a threatened libel and by the prayer of his statement of claim asks for such an injunction and costs. He succeeds and obtains his injunction and an order for costs. Nothing is recovered by the injunction in respect of which his solicitors can obtain a charging order and, if Mr. Myles is right, the solicitors cannot obtain a charging order on the sum payable in respect of the costs. Now let me take the other case. Suppose a plaintiff recovers a small sum in respect of wages, it may be only eighteen pence, and costs. According to Mr. Myles' argument, the presence of that judgment for eighteen pence entitles the solicitor to obtain a charging order, not merely on the eighteen pence, but on the whole of the plaintiffs' costs of the action which may run into 200*l*. or 300*l*. I cannot accept an argument which leads to such a conclusion, and still less can I accept it when I find the point precisely covered by the language of Lord Esher.

There are two further cases with which I should deal, because

(1) 14 Q. B. D. 543.

(2) [1911] 2 I. R. 118.

Vaisey J., in refusing the application for a charging order, referred to them. The first is *In re Viney's Trusts* (1). That case does not appear to me to touch this question. On a petition an order was made directing taxation and payment of costs out of a trust estate to the London agents of the petitioner's solicitors. The solicitors, therefore, had under that order personally a right against the fund to have their costs paid. Having that adequate protection they nevertheless tried to improve their position by asking for a charging order. It was held that they were not entitled to it because, as the learned Vice-Chancellor says, they could have no better or other security than that order which had directed the amount to be paid to the London agents. That alone was the ground on which the application was refused. The other case is *Higgs* v. *Higgs* (2) where the husband respondent in proceedings for judicial separation had been ordered to pay the wife's costs. The husband eventually became entitled to a legacy and the wife had been made bankrupt. The official receiver, as trustee in bankruptcy of the wife, obtained a garnishee order nisi attaching the husband's interest under the legacy. That, of course, was merely a form of execution issued by the representative of the wife in respect of a judgment for costs which the wife had obtained. Under that order, if it was made absolute, a sum of money in satisfaction of those costs was coming to the official receiver. The position, it seems to me, was precisely analogous to money in the hands of a sheriff under a fi. fa. issued to recover the costs payable under a judgment. The solicitors were trying to obtain a charging order on the money so to be received by the official receiver consisting of the costs with some interest thereon. The learned judge refused the charging order, and his reasons were as follows (3): "I do not "think that their summons is in order. They are asking for "a charge on property which they in fact have not recovered. "They have not got any of this property, which is in fact "recovered or to be recovered by the official receiver. The "so-called property is in the hands of the trustees of the will. "It has never in any sense been recovered by the solicitors." It is clear that the learned judge was treating the solicitors' application as one for a charging order in respect of the legacy or part of the legacy, and he said, in effect: "The solicitors "never have recovered the legacy and therefore are not

(1) 18 L. T. 851.
(2) [1934] P. 95.
(3) Ibid. 100.

"entitled to the charging order." In my opinion, the learned judge was under a misapprehension as to the nature of the application. The solicitors were not attempting to get a charging order on the legacy any more than solicitors who wish to attach money in the hands of a sheriff are seeking a charging order on the furniture which the sheriff is proposing to seize. They are asking for a charging order on the money which will be recovered, and that is all. When the official receiver obtained payment it would have been of money received in satisfaction of a judgment for costs, and the fact that it happened to come from a legacy was not of the slightest relevance to the case. In my opinion, the judgment of Bateson J. in *Higgs* v. *Higgs* (1), in so far as it rested on that part of his reasoning, was wrong and should be overruled.

I come, therefore, to the opinion that an application for a charging order in a case where the judgment is merely a judgment for costs is competent. If it were not so, the case of a solicitor for a successful defendant would be very unfortunate, since the only thing that a successful defendant gets is a judgment for costs

I now turn to the suggested distinction in the case of an originating summons issued for the construction of a will or other document. I am not sure whether I appreciate the way in which the argument is put, because I am unable to see any ground on which such a distinction can be based. An order is an order, and to draw a distinction between an order made on an originating summons and any other order for costs appears to me in principle to be unjustifiable. Mr. Myles says a proceeding by originating summons is not like a case of "hostile "litigation," but originating summonses are often extremely hostile, and I find it impossible to draw any such distinction as that contended for.

The next, and last, point with which I have to deal is this. It is said that under the section a solicitor is entitled to a charging order, not as of right, but only as a matter of discretion. That, no doubt, is true, but it is, I think, right to say that prima facie a solicitor is entitled to his charging order if he satisfies the requirements of the section, and that some good reason must be shown for depriving him of it. It has been held in many cases that some conduct of the solicitor may make it unjust to give him this form of relief. In the present case it is said that to make an order in favour of the applicants

(1) [1934] P. 95.

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will be a grave hardship on the residuary legatees and that the fact that they have no right of set-off in respect of the two sets of costs is purely accidental having come about because under the first order they personally became entitled to their costs from Colonel Blake, whereas under the second order the fund, in which they alone are interested, has been charged with Colonel Blake's costs. True that in the end the position of the residuary legatees, assuming they do not recover their costs, will be that their fund will have been depleted by payment of the costs now in issue, while they personally will be unable to recover from Colonel Blake their costs of the first application. That may be unfortunate, but the question we have to decide is whether their misfortune is sufficient to justify us in withholding from the solicitors the right to which prima facie they are entitled. I do not propose to assert as a matter of principle that the discretion should be exercised against the solicitor only in cases where some conduct of his own makes it unjust to give him the relief asked for. That, I think, would not be the proper course to take in view of the language of the section, but I think I am entitled to say that, in a case where no conduct of the solicitor was involved, it would require very exceptional circumstances to justify the court in refusing to the solicitor that security in respect of the fruit of his labours to which he is prima facie entitled. In the present case, hardship though it be to the residuary legatees, I do not find any such circumstances, and, in my opinion, that point also fails. In the result, the appeal must be allowed with costs here and below and the appropriate charging order made.

FINLAY L.J.: I agree. Although we are differing from the decision of the learned judge, the matter has been so fully covered in the judgment of the Master of the Rolls, that I do not propose to say anything.

UTHWATT J.: I also agree.

Appeal allowed.

Solicitors: *Warren & Warren; Burton, Yeates & Hart, for Nye & Donne, Brighton.*

H. C. G.

In re POWELL: NEALE *v.* ROBERTS.

VAISEY J.

1944

Nov. 1.

Will—Charitable bequest—" Such a sum as will produce after payment of tax and all other deductions the clear yearly sum of 60l."—Computation of Capital sum to be set apart—Finance Act, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

By his will, dated April 29, 1938, a testator, who died on March 22, 1943, at which date the rate of income tax was 10*s.* in the pound, bequeathed to the vicar and churchwardens of a church " such a sum as will produce after payment of tax and all " other deductions the clear yearly sum of 60*l.* to be applied by " the said vicar towards the stipend of an assistant priest " for the parish :—

Held, that in view of the provisions of s. 25, sub-s. 1, of the Finance Act, 1941, there must be substituted, for the " stated " amount " of 60*l.*, a sum equal to twenty twenty-ninths thereof, namely, 41*l.* 7*s.* 7*d.*, and accordingly the capital sum to be set aside must be such as would produce, subject to tax, 82*l.* 15*s.* 2*d.* a year.

ADJOURNED SUMMONS.

By his will, dated April 29, 1938, a testator, who died on March 22, 1943, bequeathed to the vicar and churchwardens, for the time being, of the church of All Saints, Sidley, " such " a sum as will produce after payment of tax and all other " deductions the clear yearly sum of 60*l.* to be applied by " the said vicar towards the stipend of an assistant priest " for the parish. A summons was taken out by the legal personal representatives of the testator to determine what sum must, having regard to the provisions of s. 25, sub-s. 1, of the Finance Act, 1941 (1), be set apart to satisfy the bequest.

Shebbeare for the applicants.

I. M. Phillips ; Pascoe Hayward ; H. E. Salt, and *Wilfrid Hunt* for various respondents.

Danckwerts for the Attorney-General.

(1) By Finance Act, 1941, s. 25, sub-s. 1 : " any provision, how- " ever worded, for the payment, " whether periodically or other- " wise, of a stated amount free of " income tax . . . . being a pro- " vision which is contained . . . . " in any will . . . . made before " September 3, 1939 . . . . shall, " as respects payments falling to " be made during any year of " assessment, the standard rate of " income tax for which is 10*s.* in " the pound, have effect as if for " the stated amount there was " substituted an amount equal to " twenty twenty-ninths thereof."

VAISEY J. Three contentions have been advanced with regard to the method of computing the amount of the capital sum which is the subject of the bequest. The first view, which is put forward by counsel for the vicar and churchwardens, is that the gift is of a sum which, at the time, I suppose, when it is handed over, will, after deducting tax at the current standard rate, produce 60*l.* a year, that is to say, a sum which will, as matters now stand, produce a gross amount of 120*l.* a year. Counsel has argued that ss. 25 and 27 of the Finance Act, 1941, have no application to the matter, so that this 120*l.* per annum is not to be reduced to twenty twenty-ninths thereof in accordance with the provisions of those sections, which apply in the ordinary case to a pre-war annuity given free of tax. At the other end of the scale, it is submitted by those interested in residue that, as this is a gift to legatees on a charitable trust in respect of which no income tax will be payable, all considerations relating to income tax should be disregarded and the amount which must be set aside is merely such a sum as will produce 60*l.* a year. The intermediate view is that this is a case of a pre-war annuity given tax free and that the provisions of the Finance Act, 1941, to which I have referred, apply to it.

I will take, first, the submissions which have been addressed to me on behalf of the residuary legatees. The difficulty which I feel about accepting their view of the case arises from the reference in the gift to the payment of tax. I thought at one time that the words " payment of tax " might be an incorrect reference to payment of death duties, but when one looks at the framework of the sentence, I think that cannot be right and that the " clear yearly sum " is intended to be a sum which is clear in the sense that tax and other deductions normally to be made from income as such have been provided for. If the submissions made on behalf of the residuary legatees are accurate, I do not see what sense can be given to the reference to tax. It is obvious that the ultimate object which the testator had in view was that the money should be put into the pocket of the assistant curate as part of his stipend, which money, with the rest of the income of that assistant curate, would be subject to tax in the usual way. Therefore, I must reject the argument that no more than 60*l.* a year, both gross and net, regarding the two as identical, is what has to be provided for.

The question then arises whether this is a gift of an annuity which may be notionally regarded at the moment as 120*l.* a year, or is a gift of an annuity of twenty twenty-ninths of that amount, which would be 82*l.* 15*s.* 2*d.* Mr. Hayward asks me to say that s. 25, sub-s. 1, of the Finance Act, 1941, does not apply to the case. Income tax is essentially an annual tax. The rate which obtains at the moment is only the rate for the current year. Notionally, there might be no income tax next year, or income tax might be greatly increased or greatly reduced. Nobody knows. Therefore, where a sum has to be set apart to meet a net annual sum after payment of tax the figure must be fixed on the basis of the existing rate of tax. Consequently, in the present case, one starts with this, that to determine this capital sum, it must be ascertained what amount will leave a net amount of 60*l.* a year in the hands of an ordinary recipient. Referring to the words of s. 25, sub-s. 1, of the Act of 1941, it seems to me that this gift contains a provision—I must say a somewhat strangely worded provision—for the payment periodically of an amount free of tax, and, therefore, during the material year, when the rate of income tax was 10*s.* in the £, twenty twenty-ninths of that amount is the proper amount of the gift. The object of this curious fraction of twenty twenty-ninths, as I understand it, is to put the matter on the same footing as if the tax, instead of being raised to the war-time rate of 10*s.*, had remained at the pre-war rate of 5*s.* 6*d.*

The only amount which I can fix for this capital sum, regard being had to the provisions of s. 25, sub-s. 1, of the Finance Act, 1941, is such an amount as, after the payment of tax at the current rate of 10*s.*, will leave in the hands of the vicar and churchwardens a clear yearly sum of twenty twenty-ninths of 60*l.*, namely, 41*l.* 7*s.* 7*d.* That means that a sum has to be set aside to produce, subject to tax, a sum of 82*l.* 15*s.* 2*d.* per annum. What happens in the future in regard to rates of tax is a matter to which we are not to have regard. I entirely agree with Mr. Hayward's submission when he says that this is not the ordinary case which the Act contemplates, but it seems to me that very curious results would arise, if I held that the Act did not apply at all to such a case as this.

Solicitors: *Carter & Barber, for Frape & Gauntlett, Brighton; Griffinhoofe & Brewster; Official Solicitor; Raymond-Barker, Nix & Co.; Treasury Solicitor.*

J. L D.

VAISEY J.

Oct. 18; Nov. 13.

In re VISCOUNT ROTHERMERE, DECD.

MELLORS, BASDEN & COMPANY *v.* COUTTS & COMPANY.

Administration—Covenant—Annuity free of income tax—Covenantor's estate actuarially insolvent—Valuation of annuity—Finance Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

By a deed of covenant made in 1934 R. covenanted with an annuitant and a trustee to pay to the annuitant on the last day of every calendar month during the remainder of her life such a sum as after deduction of income tax at the current rate should amount to 62*l.* 10*s.* and directed the trustee to hold such monthly sums on protective trusts as set out in s. 33 of the Trustee Act, 1925, for the benefit of the annuitant. R. died on November 26, 1940. The plaintiffs, who were creditors of R., began an action for the administration of his estate, and on June 13, 1941, a decree was made in the action for general administration. The annuitant, who had received three monthly payments since R.'s death, claimed to prove for the capital value of the annuity on the basis that the estate was actuarially insolvent, and that creditors would not be paid in full:—

Held, that the annuitant was entitled to receive the capital value of the annuity, abated if necessary; that the value must be calculated actuarially on the basis of the annuitant's age and normal expectation of life, and by reference to the purchase price of the amount of consols which, on November 26, 1940, would have been required to provide by means of its interest and recourse from time to time to capital for the payment of the gross monthly sum of 108*l.* 13*s.* 11*d.* from November 26, 1940, to March 31, 1941, during which period the rate of income tax was 8*s.* 6*d.* in the pound, and on April 30, 1941, and the last day of each succeeding month during the annuitant's life, the sum of 86*l.* 4*s.* 2*d.*, being 62*l.* 10*s.* and income tax thereon at the effective rate of 5*s.* 6*d.* in the pound, to which for purposes of freedom from tax, the rate was reduced by s. 25, sub-s. 1, of the Finance Act, 1941. No abatement should be made for the risk of a possible forfeiture under s. 33 of the Trustee Act, 1925, or for any future change in the rate of tax, or for any fluctuations in the price of consols.

ADJOURNED SUMMONS.

By a deed, dated March 14, 1934, and made between the late Lord Rothermere (hereinafter called "the deceased") of the first part, Midland Bank Executor and Trustee Co., Ld., of the second part, and Mala Rhoda Brand (hereinafter called "the annuitant"), of the third part, the deceased obliged himself and his personal representatives to pay to the party of the second part on the last day of every calendar month during the life of the annuitant commencing with February 28, 1934, such a sum as, after deduction of income tax at the rate from time to time current, should amount to 62*l.* 10*s.* 0*d.*, and he thereby directed the said party of the second part to hold such monthly sums on protective trusts as mentioned in s. 33 of the Trustee Act, 1925, for the benefit of the annuitant. The deceased died on November 26, 1940. At that date there were no arrears of the monthly sums, but after that date three payments were made, each of 62*l.* 10*s.* 0*d.*, being in respect of the sums due on the last days of the months of November and December, 1940, and January, 1941, making together 187*l.* 10*s.* 0*d.* On June 13, 1941, a decree was made in common form for the administration of the deceased's estate. Under the inquiry as to the deceased's debts and liabilities the annuitant was entitled to come in and prove in respect of her rights under the deed of March 14, 1934, and she issued this summons in the proceedings to ascertain the proper basis of such proof, it being assumed that the estate was insolvent in the sense that the creditors would not be paid in full so that their claims would have to suffer abatement. The present summons, asked (1.) whether the value of the annuity should be calculated as at the date of the covenantor's death, November 26, 1940, or the date of the decree for administration, June 13, 1941; (2.) whether the rate of income tax applicable should be calculated as at the date of the death or as at the date of the decree; (3.) whether s. 25, sub-s. 1, of the Finance Act, 1941, applied to the case, and, if so, to what extent; (4.) generally, how the value of the annuity should be ascertained.

R. Jennings for the annuitant. The value of the annuity should be based on the cost of a similar government annuity purchased at the date of the covenantor's death, when income tax was at the rate of 8*s.* 6*d.* in the pound. The tax deductible should be calculated at that rate, and no regard should be paid to s. 25, sub-s. 1, of the Finance Act, 1941, as the sum is to be ascertained as at a date before that section came into effect. The rules in bankruptcy as to probable liabilities apply when the estate is being administered by the court: Administration of Estates Act, 1925, sch. I., part I.; *In re Summers* (1); *In re Bridges* (2). In dealing with the valuation of annuities liable to abatement it is well settled that the valuation must

(1) (1879) 13 Ch. D. 136. (2) (1881) 17 Ch. D. 342.

be made on the basis of government tables. The court endeavours to be fair between all the beneficiaries, and the same applies to creditors in an administration action. [He also referred to *In re Cottrell* (1); *In re Richardson* (2); *In re Castle* (3) and *In re Hollins* (4).]

Wilfrid Hunt for the plaintiffs (creditors). The value of the annuity should be its market value and should be fixed by an actuary who should have regard to all contingencies, including the risk of forfeiture under s. 33 of the Trustee Act, 1925: *In re Blakemore* (5); *Ex parte Neal* (6); *In re Sinclair* (7). The valuation should be made as at the date of the decree for administration. *In re Twiss* (8); *In re Hollins* (4). When a tax free annuity is to be valued, the tax must be that prevailing when the valuation is made. Section 25 of the Finance Act, 1941, applies, and the effect is that the annuity can only be free of tax to the extent of 5*s.* 6*d.* in the pound. The valuation must have regard to all the facts existing at the time, and should take into consideration future possibilities, such as a reduction of the rate of income tax. See Bankruptcy Act, 1914, s. 30, sub-s. 4. In the administration of an insolvent estate, the only date for valuation of claims is the date of the order for administration. At that date the annuitant was entitled to the arrears of her annuity less 187*l.* 10*s.* already received and a valuation for the future. The date of the death is immaterial. The court having decided the question of principle involved should direct an inquiry to ascertain the value of the annuity: *In re Summers* (9). Neither the government nor any insurance company will sell any annuity free of income tax. The value must be based on that of a fixed annuity subject to tax. There are several authorities in bankruptcy law to show that the question must be referred to an actuary to ascertain the proper market price, e.g., *Ex parte Saxe* (10); Annual Practice, 1944, p. 1146. Whatever the date of valuation, the effect of s. 25, sub-s. 1, of the Finance Act, 1941, must be taken into consideration.

Jennings replied.

The defendants did not appear.

Cur. adv. vult.

(1) [1910] 1 Ch. 402, 409.
(2) [1915] 1 Ch. 353.
(3) [1916] W. N. 195.
(4) [1918] 1 Ch. 503.
(5) (1877) 5 Ch. D. 372.
(6) (1880) 14 Ch. D. 579.
(7) [1897] 1 Ch. 921.
(8) [1941] Ch. 141.
(9) 13 Ch. D. 136.
(10) (1832) 2 Deacon & Chitty, 172.

Nov. 13. VAISEY J. read the following judgment. It is surprising that the point which it now falls to me to decide has not, so far as I am aware, been decided before. Put shortly, the question is as to the proper method of proof in the administration of the deficient estate of a deceased person in respect of a tax-free annuity secured by his covenant. [His Lordship stated the facts and proceeded :] Various methods of computing the claim were suggested to me during the hearing, and the results of applying these differ so widely that, while the annuitant seeks to prove for as much as 28,516*l.*, the plaintiffs contend that the proper sum is no more than 12,400*l.* I do not know what sum will be arrived at by the method of computation to be presently explained which seems to me to be the right one.

The annuitant was born on November 29, 1903. It is not suggested that there has been any forfeiture of the life interest to which she is entitled under head (i.) of sub-s. 1 of s. 33 of the Trustee Act, 1925, and she is, in my judgment, entitled to claim on the same footing as if the life interest had been given to her unconditionally, that is, without any liability to forfeiture : see *In re Sinclair* (1), and see and distinguish *In re Beecham's Settlement* (2). In other words, no abatement in respect of the risk of a possible forfeiture is to be made, which is, perhaps, surprising when one finds that such apparently imponderable risks as forfeiture by an annuitant contracting a second marriage or ceasing to lead a chaste life have been subjected to pecuniary assessment : see *In re Blakemore* (3) and *Ex parte Neal* (4). Nor, as I understand it, in a case such as the present, is any regard paid to any possible or probable rise or fall in the rate of income tax which is annually imposed, as it were, de novo, but yet has to be treated for the purpose of such a computation as that which has here to be made as an imposition which is both permanent and static. On the other hand, the court will not treat as an unknown factor anything which has become known or can be ascertained at the time when such a problem as the present receives its solution, that is to say it will not act on hypotheses when it is able to act on realities. This principle is laid down in such cases as *In re Dodds* (5) and *Williamson* v. *John I. Thornycroft* (6). I need only mention by reference the relevant statutory provisions. They are

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(1) [1897] 1 Ch. 921.
(2) [1934] Ch. 183.
(3) 5 Ch. D. 372.
(4) 14 Ch. D. 579.
(5) (1890) 25 Q. B. D. 529.
(6) [1940] 2 K. B. 658.

s. 30, sub-ss. 3 and 4, of the Bankruptcy Act, 1914, and para. 2 of the first part of the first schedule to the Administration of Estates Act, 1925.

Now I feel bound to reject both of the two main suggestions put forward by counsel on either side for my acceptance. On the one hand, I was asked to have regard to what it would cost to purchase an annuity of corresponding amount, payable unconditionally during the life of the annuitant, either from the government, or from some well-established insurance company, or as an alternative, I was asked to take some average figure based on the various rates of purchase-money charged by an unspecified number of such companies. On the other hand, I was invited to say that the proper figure was what such an annuity would probably fetch if it were sold in the open market, if, indeed, there can be said to be such a market for such a property. In my judgment, the value must for the present purpose be ascertained actuarially. Having said that, I must go on to lay down, as best I can, the proper process of such ascertainment.

A good deal of argument was addressed to me on the question raised in para. 1 of the summons, that is, whether the value ought to be fixed at the death of the deceased, or at the date of the administration decree, or at some other, and what, time. In the view which I take of the matter, the question in the form in which it was put is hardly relevant, but, as will be seen, I think that, while the value should be taken as at the date of the death, regard must none the less be had to all the material events which have since happened or become known, though such events were at that date entirely unpredictable. I propose not to answer specifically any of the questions propounded in paras. 1, 2 and 3 of the summons, but under the general question raised by para. 4 to make a comprehensive declaration on the lines which I will now proceed to indicate.

The materials out of which I am about to formulate what I believe to be the proper method of computation are these. (1.) The annuitant's age is known. (2.) In the absence of contrary evidence I shall assume that her expectation of life is normal. (3.) The rate of income tax current at the death of the deceased and thereafter until April 5, 1941, was 8*s.* 6*d.* in the pound. (4.) During that period the sum required to produce the prescribed monthly net sum of 62*l.* 10*s.* 0*d.* was a gross monthly sum of 108*l.* 13*s.* 11*d.* (5.) Ever since April 5, 1941, the rate of the tax has been 10*s.* in the pound. (6.) That rate would, in the present case, by virtue of ss. 25 and 27 of the Finance Act, 1941, be reduced to an effective rate of 5*s*. 6*d*. in the pound. (7.) With the tax at that reduced rate the prescribed monthly net sum of 62*l*. 10*s*. 0*d*. would have resulted from a gross monthly payment of 86*l*. 4*s*. 2*d*. These figures will, I hope, be checked. If they are the result of inaccurate arithmetic the necessary corrections must be made. Assuming them to be accurate, I have come to the conclusion that the sum for which the annuitant is entitled to prove is the sum arrived at by ascertaining by an actuarial calculation. "What sum of money would have been required on "November 26, 1940, to purchase an amount of consols sufficient by means of the interest and by recourse from time to "time to capital to provide during the residue of the life of a "lady born on November 29, 1903, the following sums payable "on the last day of every calendar month, namely, from the "last day of November, 1940, to the last day of March, 1941, "both dates inclusive, the sum of 108*l*. 13*s*. 11*d*., and on the "last day of April, 1941, and the last day of every succeeding "month during the residue of such life the sum of 86*l*. 4*s*. 2*d*., "it being assumed that the lady has a normal expectation of "life, no regard being had to exceptional war risks, and no "allowance being made either (*a*) for any variation in the price "of consols after November 26, 1940, or (*b*) for brokerage or "other expenses incident to realizations of capital?" For taking consols as the basis of investment the authority is *In re Hollins* (1). The purchase of consols is, of course, purely notional, so that allowances for brokerages and so forth would appear to be out of place. I should have said that, though the sum of 187*l*. 10*s*. 0*d*., paid for the three months preceding February, 1941, does not come into the proposed calculation at all, it must be treated as a prepayment on account of whatever amount the annuitant is entitled to receive in respect of her claim in accordance with this judgment, or, to put the matter in another way, she must bring that sum back into the estate before she is entitled to take anything out of it.

Solicitors: *Gordon, Dadds & Co.; Roney & Co.*

(1) [1918] 1 Ch. 503.

H. L. L.

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1944

Nov. 6, 7, 8; Dec. 11.

Lord Greene M.R., Finlay and Morton L.JJ.

MARLBOROUGH (DUKE) *v.* ATTORNEY-GENERAL.

(No. 1.)

Revenue—Succession duty—Marriage settlement—Attachment of duty—"Proper law of the settlement"—Evidence of intention—Admissibility.

On the marriage, in New York, of a domiciled Englishman to the daughter of a domiciled citizen of the United States, a settlement was entered into by which the father of the bride (who was then a minor) covenanted to settle on his daughter certain amounts of American stocks and certain annual sums expressed in dollars. The settlement was in English form and contained a covenant by both spouses to seek the approval as soon as possible of the Chancery Division in England under the Infant Settlements Act, 1855 (which approval was duly obtained). One of the trustees was a citizen of the United States and the other was an Englishman. The matrimonial home was in England, but the trust funds remained and were always administered in the United States. After the death of the husband, the question arose whether succession duty attached to the settled funds:—

Held, that the right test was the proper law of the contract, and not the forum, which might, however, be an element in determining what law the parties intended to govern the contract.

Held, also, that, to ascertain the proper law of the contract, all such evidence of the circumstances as was generally admissible to construe a written contract was admissible; but direct evidence of intention was inadmissible.

Wallace v. *Attorney-General* (1865) L. R. 1 Ch. 1 and *Attorney-General* v. *Belilios* [1928] 1 K. B. 798 followed. Observations in *In re Cigala's Settlement Trusts* (1878) 7 Ch. D. 351 and *Attorney-General* v. *Jewish Colonization Association* [1900] 2 Q. B. 556; [1901] 1 K. B. 123 commented on.

Appeal from Vaisey J.

This originating summons taken out by the tenth Duke of Marlborough under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, raised the question whether, on the true construction of a settlement, dated November 6, 1895, and executed in New York on the occasion of the marriage between the ninth duke and Miss Consuelo Vanderbilt (now Madame Balsan) and in the events which happened, estate duty became payable on or in respect of the funds therein comprised by reason of the death of the ninth duke on June 30, 1934. Miss Vanderbilt was the daughter of Mr. W. K. Vanderbilt, a citizen of the United States. At the time of her marriage she was a minor. The settlement comprised a fund of two and a-half million dollars in the stock of an American railway, and no English property at all. There was also a covenant by Mr. Vanderbilt to settle an annual sum of $100,000 for the wife's separate use without power of anticipation during the joint lives of himself and the wife, and a covenant for the payment by his executors on his death of a further $2,500,000. There was a covenant for the settlement of the wife's after-acquired property "with "a minimum of 10,000*l*." The trustees were Mr. Vanderbilt and the Hon. Ivor Churchill Guest (afterwards Lord Wimborne). The investment clause provided a wide range of British and American securities in which the trustees might invest. In fact, the funds had always been invested in American securities, and the administration of the trust had taken place in America, but it was the intention of the parties that Miss Vanderbilt should marry a domiciled Englishman and that the matrimonial domicile of the parties should be English. The settlement contained a covenant that the husband and wife would as soon as possible take all necessary steps to procure the approval of the Chancery Division of the English High Court of Justice under the Infant Settlements Act, 1855. Provision was made for the case of the court refusing to approve, and for the possibility of the wife repudiating the settlement. On January 27, 1896, Chitty J. in chambers sanctioned the settlement. On the death of the duke the question arose whether for the purpose of succession duty (and therefore of estate duty) the settlement was to be treated as an American or an English settlement. Vaisey J. held that it was an English settlement, and that both succession duty and estate duty became payable thereon on the death of the ninth duke. The tenth duke appealed.

Harman K.C. and *J. A. Wolfe* for the plaintiff. The settlement is an American settlement. It is true that its form is English, and that prima facie the forum for enforcing the provisions of a settlement is that of the matrimonial domicile, but the presumption from this that the settlement is English is rebutted by the contemporaneous circumstances, such as the intention of the parties, the nature and position of the property settled, and the location of the trustees. Moreover, the wife has remarried. Her present husband is a Frenchman, and she is domiciled in the United States. Under the Finance Act, 1894, s. 2, sub-s. 2, property situate out of the United

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Kingdom which passes on the death is to be included in the property on which estate duty is payable only when legacy or succession duty would be payable. The position as to succession duty depends on s. 2 of the Succession Duty Act, 1853, which, though extremely wide in terms, has had its effect restricted by judicial decision: *Wallace* v. *Attorney-General* (1). The test there laid down by Lord Cranworth L.C. is whether the successor claims by virtue of the laws of this country, and that turns on what is the true forum of administration. Cases showing how the prima facie rule referred to above can be rebutted are: *In re Fitzgerald* (2); *In re Mackenzie* (3); *Attorney-General* v. *Campbell* (4); *In re Cigala's Settlement Trusts* (5); *Attorney-General* v. *Felce* (6); *Attorney-General* v. *Jewish Colonization Association* (7); *Attorney-General* v. *Belilios* (8); and *In re Cloncurry's Estate* (9). The effect of the authorities is to show that regard must be had to the parties' intention when executing the settlement, and that all the facts must be weighed to ascertain what would be the natural place to resort to in order to obtain a direction with regard to the administration of the trust. When the parties to the deed are available, regard must be had to what they say, and there is no room for any presumption as to the forum of administration. Here the wife and one of the original trustees are available, and it is submitted, though there is no authority, that they can give evidence of their intention. As to the form of the settlement, a separate use without power of anticipation would be familiar to American lawyers. Though the words of the settlement in parts do not fit the law of the State of New York and must refer to English law, that does not necessarily mean that it is an English court that is to apply it. It seems that when the application was made for the approval of the court under the Infant Settlements Act, 1855, the master had some doubt as to jurisdiction, but Chitty J. made the order. No objection was taken to the instrument being unstamped. The Infant Settlements Act, 1855, is wide enough to cover the power to sanction a foreign settlement made by a woman who became a British subject on marriage. It is submitted that the following considerations are all in the plaintiff's favour:—

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(1) (1865) L. R. 1 Ch. 1.
(2) [1904] 1 Ch. 573.
(3) [1911] 1 Ch. 578, 596.
(4) (1872) L. R. 5, H. L. 524.
(5) (1878) 7 Ch. D. 351.
(6) (1894) 10 T. L. R. 337.
(7) [1901] 1 K. B. 123.
(8) [1928] 1 K. B. 798.
(9) [1932] I. R. 687, 711.

1. The inherent probability of the matter, having regard (*a*) to the subject-matter of the settlement, and (*b*) to the position of the parties. It is inconceivable that Mr. Vanderbilt, either on his own behalf or as the infant's guardian, could have intended to put these sums outside the jurisdiction of the American courts. 2. That no English legal advice was taken by Mr. Vanderbilt or by the wife, but American lawyers explained the provisions of the settlement. 3. That the document was unstamped. 4. The situation of the trust property, and the whole history of the trust. Every penny was invested in American securities and managed in New York. 5. The document was perfectly effective under New York law. 6. The marriage took place in New York and the document was executed there. 7. The evidence of the intention of the parties. 8. Mr. Vanderbilt's covenants could only be enforced in America.

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown. The law of the matrimonial domicile is the law which one would expect to apply. That is a strong presumption, and it is here reinforced by the facts that the settled funds were to be part of the property of an English dukedom and the settlement was in English form. These two factors, taken together, are really conclusive, but the sanction of the court which was provided for by the settlement itself is another clear indication that this is an English settlement. *Harding* v. *Commissioners of Stamps for Queensland* (1); *Lambe* v. *Manuel* (2); *Toronto General Trusts Corporation* v. *Reg.* (3) all point to the conclusion on the law which comes out most clearly in *Attorney-General* v. *Belilios* (4). In many of the cases the beneficiaries were out of the country, but in none of the cases in which the law of the domicile was not followed was the settlement consistent with the law of the domicile.

Cur. adv. vult.

Dec. 11, 1944. The judgment of the court was read by LORD GREENE M.R. The first question that arises on this appeal is whether or not on the death of the ninth Duke of Marlborough succession duty, and, consequently (under s. 2, sub-s. 2, of the Finance Act, 1894), estate duty, became payable in respect of the American securities held under one of the settlements which were executed on his marriage in 1895 to Miss Consuelo Vanderbilt. Vaisey J. held that the

(1) [1898] A. C. 769, 774.
(2) [1903] A. C. 68.
(3) [1919] A. C. 679.
(4) [1928] 1 K. B. 798.

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duties were payable, and at the end of the argument we intimated that we agreed with his conclusion. As, however, the questions raised involve some important matters of principle we thought it desirable to give our reasons in writing.

Counsel for the duke and for the Crown were in agreement in submitting that in the case of a marriage settlement the question whether succession duty is payable under s. 2 of the Succession Duty Act, 1853, is to be answered by reference to the law governing the settlement—in other words, the proper law of the settlement. They agreed that duty attaches if, and only if, the proper law of the settlement is English (or Scottish as the case may be). This proposition is, in our opinion, based on a correct view of the law, but, as there are to be found in the authorities certain observations which suggest that succession duty is attracted where the forum for proceedings under the settlement is English—a test different from that of the proper law of the settlement—and as Vaisey J. appears to have favoured that opinion, we think it right, first of all, to make some examination of the law on the subject to justify our own view.

The examination necessarily starts with *Wallace* v. *Attorney-General* (1), where Lord Cranworth held that no succession duty was payable on legacies bequeathed by a testator domiciled in France. He formulated the question in these words. " The question, therefore, is whether, where a person " domiciled abroad makes a will giving personal property in " this country by way of legacy, the legatee is a person " *becoming entitled* to that property within the true intent " and meaning of the second section." He treated the question, therefore, as one of the construction of the words " become " entitled " in the section. He answered it by saying " I think " not. I think that in order to be brought within that section, " he must be a person who becomes entitled by virtue of the " laws of this country." Again, he says (2) : " the only safe " way of solving this question . . . . is to consider the duty " as imposed only on those who claim title by virtue of our " law." If this language is carefully studied it is apparent that Lord Cranworth was thinking, and thinking only, of the law which confers the title and was not thinking of the court in which the claim to title is to be enforced. In the case of a testator it is the law of his domicile which governs the construction of the will and the validity of its disposition. It

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(1) L. R. 1 Ch. 1, 7.

(2) Ibid. 8.

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is by reason of that law that the beneficiary claims title, whatever the forum may be in which he happens to make his claim. The law "by virtue" of which a person claims title and the forum in which he claims it are two quite different things. The forum may be that of the country by virtue of whose law the title is claimed, or it may not. The claimant may even have a choice of fora, but, whatever forum has jurisdiction, the law by virtue of which the title is claimed remains the same—scilicet, the law of the domicile.

If the principle laid down by Lord Cranworth in the case of wills is applied to the case of a marriage settlement, the result does not appear to us to admit of doubt. In the case of a will the law under which title is claimed is the law of the domicile. In the case of a marriage settlement the law under which title is claimed is the law which governs the settlement. This law can only be the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities. There is, as it seems to us, a precise analogy between the law of the domicile in the case of wills and what is conveniently called "the proper law" of the settlement in the case of marriage settlements. What is the proper law of the settlement may, of course, give rise to controversy as it has done in the present case, and the question what weight ought to be given to the various factors which may properly be taken into consideration may not always admit of a ready answer, but the principle that the matter to be ascertained is the proper law of the settlement appears to us to flow inevitably from Lord Cranworth's original decision.

We find support for this view in the judgment of Sargant L.J. in *Attorney-General* v. *Belilios* (1). After quoting the principle as laid down by Lord Cranworth that to come within the section the successor must become entitled by virtue of the laws of this country, the learned lord justice proceeded as follows: "It is argued for the Crown that subsequent "decisions show that his limitation was too broad; and it is "no doubt the case that in subsequent judgments the test "adopted by Lord Cranworth has not been always applied "in the precise terms employed by him. But I do not think "that his language has ever been disapproved or, indeed, "adversely criticized. And in the cases in which the courts "have since had to consider whether the documents in "question created a taxable succession, I think that the

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(1) [1928] 1 K. B. 798, 819.

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"various indications on which they have relied have almost "always been indications as to the law under which the "succession arises, and that the question so often put as to "whether the documents form an English settlement is "substantially the same as Lord Cranworth's test. And, "further, it is to be noted that the test suggested in *Wallace* v. "*Attorney-General* (1) has been adopted in two comparatively "recent cases of high authority: *Winans* v. *Attorney-*"*General* (2); *Toronto General Trusts Corporation* v. *The* "*King* (3)." The whole of this judgment will be found to repay a careful examination, but there are two earlier decisions which we must mention. The first is *In re Cigala's Settlement Trusts* (4). That was a case of a marriage settlement executed in English form in England on the marriage of an English lady to a domiciled Italian. Of the four trustees, three were English and one Italian. The wife settled investments of her own which were partly French and partly British. The matrimonial domicile was clearly Italian since the spouses went to Italy immediately after the marriage and lived there until their deaths. On the death of the husband the question arose whether succession duty was payable on the French investments. Sir George Jessel M.R. held that duty was payable, and there can be no question about the correctness of the decision. There are, however, some phrases in the judgment which we find it difficult to follow. The Master of the Rolls begins his judgment by referring to the form of the settlement and the fact that it was written in the English language and (what seems to us to be a matter of little, if any, importance) was executed in England in contemplation of a marriage which was to take place in England, and to the fact that three of the four trustees were English. This, he considered, made it an "English settlement." He also points out that the settlor was English and that the French investments, although foreign in character, were subject to the rule "mobilia sequuntur personam." He also refers to the fact that at the date of the hearing all the trustees were English and subject to British jurisdiction, and that the forum for deciding on the claim of the children was a British court. It must be conceded that in this judgment no reference is made in terms to the proper law of the settlement, and one, at least, of the considerations to which the Master of the Rolls attached importance, namely, that all the trustees were then English so that the forum was necessarily English could have no bearing on that question. Moreover, he appears to attach no importance to the fact that the matrimonial domicile was Italian, although it was clearly insufficient to outweigh the other considerations pointing to English law as the proper law of the settlement.

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(1) L. R. 1 Ch. 1.

(2) [1910] A. C. 27.

(3) [1919] A. C. 679.

(4) 7 Ch. D. 351.

We are not prepared to accept in its entirety the opinion of Sargant L.J. in *Attorney-General* v. *Belilios* (1) with regard to this decision, namely, that the reasoning of Sir George Jessel M.R. does not run contrary to the decision in *Attorney-General* v. *Campbell* (2). The greater part of the matters referred to by the Master of the Rolls were undoubtedly relevant to the question what was the proper law of the settlement, but the Master of the Rolls was, apparently, attaching weight to the situation as it existed at the date of the husband's death when, as he said, the forum was English. It may well be the case that the proper law of a settlement can be changed by subsequent events, but we do not see how this can happen without the concurrence of the beneficiaries agreeing to a change in the proper law and thereby, in effect, making a new settlement. It cannot, we think, be effected by a change in trusteeship and this appears to have been the view taken by this court in *Attorney-General* v. *Belilios* (1): see particularly the observations of Sargant L.J. at page 822.

Another matter relied on by the Master of the Rolls causes us some difficulty, namely, the situation of the settled property. In determining what is the proper law of the settlement the nature and situation of the property settled is, no doubt, a matter to be taken into consideration, but the relevant date for this purpose can only be the date of the settlement itself since we do not see how a change, for example, from foreign investments to English investments can turn what was originally a foreign settlement into an English settlement. As in the case of trustees, so in the case of investments a change may be quite fortuitous and cannot affect the question what law governs the settlement. Sir George Jessel M.R. did not, as we read his judgment, rely on any change in the investments, but he referred to them as "English property" for the reason, as we have pointed out, that the lady who settled them was at the date of the settlement a domiciled English woman. We do not ourselves think that in the case of a marriage settlement

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(1) [1928] 1 K. B. 798, 815.

(2) L. R. 5 H. L. 524.

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what we may call the national character or location of settled property (which, as we have said, is a relevant consideration) is to be ascertained by reference to the rule "mobilia sequuntur "personam." That character and location is, we think, a relevant consideration for what it is in fact, not for what (for some purposes) it notionally is by virtue of a conventional rule of law. In the case of a wife who acquires the domicile of her husband on marriage it does not appear to us to be right to attribute to personal property which she settles a character and location by reference to her antenuptial domicile which ex hypothesi is going to be changed immediately after the marriage takes place. Moreover, in the case of both spouses, the matrimonial domicile is the one which must be taken to be in their contemplation when they execute the settlement. For these reasons, although, as we have said, the character and location of the settled property are relevant matters to be taken into consideration in deciding what is the proper law of the settlement they are not, in our opinion, to be ascertained by reference to anything but the true facts relating to the property.

The next case is *Attorney-General* v. *Jewish Colonization Association* (1). There a domiciled Austrian assigned property to an English company by deed under which the settlor was to receive the income during his life and after his death the company was to apply the property for the benefit of Russian Jews. The settlement was written in the English language and was in English form. The company was one which apart from formal matters conducted its business from its principal office in Paris. At the death of the donor when duty was claimed the greater part of the investments were foreign investments and only a small proportion were British. Speaking of this case in *Attorney-General* v. *Belilios* (2), Sargant L.J. points out that it would not have been necessary for the court "to apply foreign law for the purposes of "administration." There was, he said, "a duly constituted "English trust to be administered as such, though the origin "of the constitution of the trust has been foreign." This, in our opinion, places the decision on the correct basis, namely, the proper law of the contract which was undoubtedly English. But there are some observations which might suggest that this court was applying a different test. Thus, Sir Archibald

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(1) [1900] 2 Q. B. 556; [1901] 1 K. B. 123.

(2) [1928] 1 K. B. 798, 820.

Smith M.R. says (1): "The baron had resort to an English "corporation . . . . in order that his donation . . . . might, "if need be, be administered by English judges according to "English law." This may, perhaps, be understood as meaning that the forum contemplated had importance *as such*. We should prefer ourselves to say that the forum which the parties contemplate in so far as it can be ascertained from the transaction is an important matter to be considered in deciding what is the law which the parties contemplate as governing the transaction. Again, the Master of the Rolls appears to attach importance to the fact that the "deed . . . . appointed "English trustees subject to the English law and any action "brought to enforce the provisions of the deed would have to "be brought in an English court of justice." He later quotes with approval the words of Sir George Jessel M.R., *In re Cigala's Settlement Trusts* (2): "This is . . . . personal "property in the hands of English trustees and you cannot "get it from them except by an action in England. That "is the true test." Sir Archibald Smith's references to forum must not, we think, be read as meaning that forum is of itself the test since the forum may be different at different times, but in the case before him the forum which he found was contemplated had a special weight in deciding what was the proper law of the contract since the trustees were an English corporation which was clearly intended to act in perpetuity. The possibility of a change in the trusteeship and consequently in the forum could not have been present to the mind of the donor. The judgment of Collins L.J. is, we think, based on the view that the proper law of the contract is the decisive matter and his reference to "the jurisdiction of the English "law" cannot be read as suggesting that forum by itself constitutes the test. His statement on the same page that in order to succeed the company must show that the donor intended to preserve the "foreign locality" of the settled property "that is that it should continue to follow the person, "not of the new owner, but of the original donor" must, we think, be understood as meaning that the company must show that the law contemplated by the donor as governing the settlement was not English law but the law of his domicile, namely, Austrian law. The judgment of Stirling L.J. appears to throw doubts on the binding character of Lord Cranworth's rule (1), doubts which cannot now be regarded as well-founded. He also, in some passages in his judgment, appears to regard the test of forum as the general test, but, if this is the right construction to be placed on his words, we cannot agree with them for the reasons which we have already sufficiently explained.

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(1) [1901] 1 K. B. 123, 130, 131, 133, 135.

(2) 7 Ch. D. 351.

After a careful consideration of these and other authorities we have come to the conclusion that in the case of a marriage settlement succession duty is exigible only where the proper law of the settlement is English (or Scottish) law, that is to say (to use the language already quoted of Sargant L.J.) "the law under which the succession arises." The question, therefore, in the present case is whether that law is the law of England or the law of the State of New York. On what principle is it to be answered? On the same principle, as it seems to us, as a similar question arising in the case of any other personal contract. For this we cannot do better than quote the words of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* (2): "When two parties living under different "systems of law enter into a personal contract, which of these "systems must be applied to its construction depends upon "their mutual intention, either as expressed in their contract, "or as derivable by fair implication from its terms. In the "absence of any other clear expression of their intention it "is necessary and legitimate to take into account the "circumstances attendant upon the making of the contract "and the course of performing its stipulations contemplated "by the parties." At the outset of the inquiry in the present case lies a question as to the admissibility of certain direct evidence as to the actual intention of the parties, particularly the intention of Mr. W. K. Vanderbilt himself. We cannot see on what principle evidence of this character is admissible and counsel for the duke was unable to refer to any case in which it was admitted for the purpose of determining the proper law of a contract. The language of Lord Watson appears to us quite clearly to imply that such evidence is inadmissible. The question what law the parties to a contract contemplate as governing its meaning and operation is, we venture to think, a question of construction the answer to which depends, as Lord Watson says, on "their mutual intention, either as "expressed in their contract or as derivable by fair implication "from its terms." For this purpose, all such evidence of the

(1) [1901] 1 K. B. 123, 142.

(2) [1894] A. C. 202, 212.

circumstances as is generally admissible for the purpose of construing a written contract is admissible to ascertain its proper law. Direct evidence of intention is, in our opinion, clearly inadmissible for that purpose.

When we turn to the settlement in this case and such circumstances as are admissible, we find the following matters to be considered. Miss Vanderbilt, the settlor of the railway stock, was at the date of the settlement domiciled in the State of New York but the matrimonial domicile of the parties was clearly to be English. The securities which she settled were American securities, but the terms of the settlement permitted their sale and the re-investment of the proceeds in English securities. Mr. W. K. Vanderbilt himself was domiciled in the State of New York. Of the two trustees, one was Mr. W. K. Vanderbilt, the other was Mr. Ivor Guest, a domiciled Englishman resident in England, so that, presumably, both the courts of the State of New York and the English court would have been competent to enforce the trusts of the settlement. The settlement was executed in New York in triplicate, one part being handed to the English trustee, who brought it to England. For some reason he did not have it stamped, but this can have no bearing on the question what is the proper law of the settlement ? The settlement itself was drafted in English form. Taking into account these considerations alone and attaching particular weight to the fact of the matrimonial domicile being English, we should have had little hesitation in deciding that the proper law of the settlement was English, but there are certain provisions in the settlement which appear to us to place this beyond all possible doubt. The first is the reference to " the statutory power of appointing a new " trustee," a phrase which would be quite meaningless if the law of the State of New York were contemplated. The next provision is the special indemnity given to the trustees " in " addition to the indemnity given by law to trustees." The law referred to can only be the law of England since the evidence shows that the law of the State of New York, although it recognizes the validity of a contractual indemnity to trustees, does not of itself provide for any indemnity. The last provision is that for the making of an application to the English courts under the Infant Settlements Act with a view to making Miss Vanderbilt's settlement binding on her by English law. It is true that this only affects her own part of the settlement. It points, however, quite clearly to English law as being the

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proper law of the settlement so far as her part in it was concerned, and we can see no reason for thinking that Mr. W. K. Vanderbilt's part of the settlement was intended to be governed by a different law to that which was to govern the settlement of her property by his daughter.

In the result, although we differ from the view which Vaisey J. appears to have taken as to the proper test for deciding whether duty is payable and as to the admissibility of some of the evidence which he took into consideration, we are in agreement with the conclusion at which he arrived on this part of the appeal.

Appeal dismissed.

Solicitors for the Duke of Marlborough : *Nicholl, Manisty, Few & Co.*

Solicitor for the Crown : *Solicitor of Inland Revenue.*

J. W. H.

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Nov. 20, 21 22, 23
Lord Greene M.R. Finlay and Morton L.JJ.

PICKEN AND OTHERS v. LORD BALFOUR OF BURLEIGH AND OTHERS.

Pension—Compulsory scheme—Contributions—Deductions from wages—War bonus—Part of "wages"—Benefits—Computation on percentage of wages—Claim to increased pension—Liability of workman to make good under-payments to superannuation fund.

By r. 1 (E) of rules and regulations of 1914 which set out the constitution of a compulsory pension scheme started by the Great Northern Railway Co., in 1875, and afterwards taken over by the London & North Eastern Railway Co., "'salary' includes wages, "and any bonus, house, or house allowance." Rule 28 provided that every member, so long as he continued in the employment of the company, should contribute to the fund as provided in the appendix ; r. 29 that contributions of every member should be deducted from his salary ; and r. 30 that the company should contribute in any half year to the fund out of revenue a sum equal to the amount contributed by the members in the same half year. Under the tables of the appendix contributions were calculated on "percentage of salary" and benefit payments on "percentage of "average salary during membership."

"War bonus" had been paid to members of the railway operative grades from 1915 to 1920, and were then merged in revised rates of salary, the name having changed to "war wages" in 1917, and "war bonus" or "war wage" had been paid to the railway shop workers since 1915. In the deduction of members' contributions the war bonus or war wage had not been taken into account, nor had it been included in the salary for the purpose of computing benefits:—

Held, (1.) that "war bonus" (in which expression was included "war wage") was wages, and, therefore, included in "salary" within the meaning of the definition in r. 1 (E); (2.) that where by reason of the existence of war bonus, the pension payable to a member had been computed at too low a rate, he was not entitled to the higher pension until he had made good his under-contributions, due to war bonus not being taken into account in the deduction of contributions, on the ground (i.) that the right to a pension was dependent on the proper contributions having been made; and (ii.) that the equitable principle was applicable under which a person was not entitled to take money from a fund without making good anything he owed to the fund.

In re Tees Conservancy Act, 1907, *Tees Conservancy Commissioners* v. *James* [1935] Ch. 544 considered and explained. *Dewhurst* v. *Salford Guardians* [1925] Ch. 655, and *Gissing* v. *Liverpool Corporation* [1935] Ch. 1 applied.

APPEAL from Evershed J.

The plaintiffs, Thomas J. Picken, George Southern and Richard J. H. Bennett, were all employed by the Great Northern Railway Co. before it was dissolved by the North Eastern, Eastern & East Scottish Amalgamation Scheme, 1922, when the undertaking and assets of the Great Northern Railway Co. vested in the defendants, the London & North Eastern Railway Co., subject to all the rights, powers, authorities, engagements, contracts and obligations of the old company. The plaintiffs had all become members of the Great Northern Superannuation Fund which continued after 1922 as if there had been no amalgamation of railway companies, any powers of the Great Northern Railway Co. for the purposes of the statutes and rules and regulations relating to the fund being thereafter exercised by the defendants. No new members were afterwards admitted to the fund so that it became a dying fund. The superannuation fund was established pursuant to ss. 42 and 45 of the Great Northern Railway (Various Powers) Act, 1872, and ss. 46 and 48 of the Great Northern Railway (Further Powers) Act, 1874, and by a deed, dated June 25, 1875, the rules and regulations of the fund being set out in a schedule to the deed. The scheme had been from time to time amended and modified by successive deeds since that time, the last of these deeds being dated September 1, 1914, and set out in the schedule to that deed were the amended rules and regulations which had only been modified subsequently in manners not material to be referred to.

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The material provisions of the rules and regulations were as follows :—Rule 1. " In the construction of these rules and " regulations and the appendix hereto . . . . except so far as " the context or the nature of the subject-matter may other- " wise require . . . . (E) 'Salary' includes wages, and any " bonus, house, or house allowance." Rule 2 : " The fund " shall be vested in and managed by a committee of nine " persons of whom six . . . . shall be appointed by the " board and three . . . . shall be elected by and from the " members of the fund." Rule 12 : " The fund shall consist " of the contributions of members and of the company, and " of all additions and accretions from whatever source " arising." Rule 14 : " Members shall be divided into two " classes, known as class I and class II . . . ." Rule 18 : " Every officer or servant whose salary at the date of his " joining the fund amounts to 80*l*. per annum . . . . shall " belong to class I . . . ." Rule 26 : " (i.) If and when the " salary of a member in class II who is under thirty-five years " of age shall be increased to and beyond 80*l*. per annum, " such member shall be transferred to class I, and shall cease " to be a member of class II." Rule 28 : " Every member, so " long as he continues in the employ of the company, shall " contribute to the fund in accordance with the tables set " forth in the appendix, applicable to the class and division " to which he belongs . . . ." Rule 29 : " The contributions " of every member shall be deducted from his salary and " credited to the fund." Rule 30 : " The company shall " contribute every half year to the fund out of their revenue " a sum equal to the amount which during the same half year " has been contributed thereto by members . . . ." The tables of the appendix provided for contributions calculated on " percentage of salary " and benefit payments on " percentages " of average salary during membership." Only members of class I were entitled to pensions.

The first two plaintiffs, engine drivers, as belonging to the railway operative grades, were, from February, 1915, in receipt of war bonuses which were converted into war wages in 1917 and ended on January, 1920, after which war wage was merged in revised rates of salary. The third plaintiff, a locomotive running shed fitter, as belonging to the railway workshops staff, was in receipt of war bonus or war advance from February, 1915, which was altered to war wage in 1917, and had continued to be paid at varying rates ever since. The defendant committee, by whom the fund was managed, had in every case calculated the contributions to be made to the fund on the bare rate of wages applicable to the grade or position of the servant without taking into account war bonus or war wage, overtime, or Sunday extra pay, and had adopted the same method in calculating benefits. No question arose about the war bonus made payable during the present war as by agreement this was not to be brought into account in any calculations in regard to the fund.

In the present proceedings the plaintiffs claimed: the plaintiff, Picken, a declaration that the contributions to be made by him to the fund were properly to be calculated on a percentage of his actual wages, including overtime and Sunday extra pay; the plaintiff, Southern, a declaration (*a*) that the pension benefits payable to him were to be calculated on the percentage of actual wages including overtime, Sunday extra pay, and war bonus, and (*b*) that he was entitled to be paid these benefits without any deduction therefrom in respect of under-deductions from his wages during the period when he was a contributor; and the plaintiff, Bennett, a declaration that the contributions to be made by him to the fund were properly to be calculated on a percentage of the actual wages paid to him including overtime, Sunday extra pay and war bonus. The plaintiffs, Picken and Bennett, further claimed that they were entitled to be paid the wages due to them from time to time without any deductions in respect of under-deductions from their past wages.

Evershed J. held that, although bonuses of the character of commissions were paid to certain persons on the traffic staff as a reward for getting extra carriage business and other bonuses were paid in respect of trips by a particular type of locomotive and for saving coal, he thought that the words "any bonus" in the definition of "salary" extended to war bonus which was an additional wage intended to compensate the wage earner for higher costs of living. After the words "war wage" came to be used instead of "war bonus" the payment was included in the word "wages." It followed that war bonus or war wage should be included in the salary for the purpose of computing contributions and benefits. He, further, held that "wages" did not include overtime or Sunday extra pay, but must be confined to the standard rate as increased by war bonus or wage in calculating contributions and benefits. Lastly, the question arose whether, assuming the plaintiff, Southern, to be entitled to a larger pension than he was receiving by reason of the obligation to take into account war bonus or war wages paid between 1915 and 1920 as part of his wages in those years, he could get it without contributing to the fund the deficiency in his contributions in those years. It was a general principle in equity that a beneficiary claiming from a fund must make good to the fund anything due from him, but he must follow Farwell J.'s decision in *Tees Conservancy Commissioners* v. *James* (1), and hold that no liability rested on either the plaintiff, Southern, or existing contributors to the fund to make good the past under-payments. In the result, no order was made in regard to the plaintiff Picken's claim, but the appropriate orders were made in the other two cases. The defendants appealed. There was a cross-appeal by the plaintiffs raising the question in regard to overtime and Sunday extra pay which was dismissed on the construction of the scheme and does not call for report.

Sir Walter Monckton K.C., *Harman K.C.*, and *Wilfrid Hunt* for the defendants. War bonus is not bonus or wages within the definition of "salary" in r. 2 of the rules and regulations. "Bonus" means a boon or a benefit or gratuity to workmen above their wages, something wholly to the good: see the definition of "bonus" in the Oxford English Dictionary. "War Bonus" is an expense allowance given to meet the increased cost of living. It merely preserves to the existing wages the value they had before the increase. It must be remembered that war bonus is variable in amount and in any year the amount of it added to the wages might increase a workman's wages to beyond 80*l.* per annum, so that, under r. 26, he would be transferred from class II to class I, yet, soon after, the war bonus might be reduced so as to bring his wages below 80*l.* The result would be that he would continue to be in class I although his wages did not justify it. When once a man is transferred to class I there is no way of transferring him back to class II. If, however, war bonus is to be included in wages, so as to give a retiring workman a higher pension, he must make good the under-payment of contributions on that footing. In deciding the contrary, Evershed J. felt bound by Farwell J.'s decision in *Tees Conservancy Commissioners* v. *James* (1). That case is distinguishable, and, if not, it ought to be overruled. The workman is liable to

(1) [1935] Ch. 544.

make good under-deductions from his wages under his contract: see r. 28. The provision that contributions are to be deducted from the salary is a mere matter of machinery. Further, the equitable principle applies that anyone receiving money out of a trust fund must make good what he owes to the fund first: *In re Rhodesia Goldfields, Ld.* (1); and *In re Peruvian Railway Construction Co.* (2). In *Dewhurst* v. *Salford Guardians* (3) the order was made subject to the obligation to pay whatever was owing to the fund in question: see also *Gissing* v. *Liverpool Corporation* (4).

Beney K.C. and *M. R. Nicholas* for the plaintiffs. War bonus is either "wages" or else it is "bonus" within the definition in r. 2. It is an increase in wage rates conceded because of the recognized inadequacy of the existing rates due to the increased cost of living: *Sutton* v. *Attorney-General* (5), and *James* v. *Tees Conservancy Commissioners* (6). [They were stopped on this point.] There is no obligation on a member to pay contributions under-deducted in the past. The failure to deduct the proper sums from wages was in no way due to any default of the members who had no voice in the matter. The committee of the fund and the railway company decided the amount, and the latter effected the deductions. The members pressed for larger deductions, but their requests were ignored. The rules do not impose any liability on the members to contribute save by the one and only method of suffering deductions, and these must be effected at least half yearly. It is now too late to make deductions in respect of any under-deductions more than six months back. The equitable principle exemplified by *In re Akerman* (7) is not applicable save when the person seeking to obtain benefits due to him from a fund owes a debt to that fund. There is no debt due to the fund from the members. They have been overpaid wages through a mistake of law on the part of the committee and the railway company, and the railway company and not the fund have made the overpayment. Such an overpayment does not create a debt. An attempt to apply the principle to a case of mistaken overpayment of annuities by the process of withholding distribution of any part of the residuary estate to the overpaid annuitant

(1) [1910] 1 Ch. 239.
(2) [1915] 2 Ch. 144.
(3) [1925] Ch. 655; [1926] A. C. 619.
(4) [1935] Ch. 1.
(5) (1923) 39 T. L. R. 294.
(6) (1933) 46 Ll. L. Rep. 19, 283.
(7) [1891] 3 Ch. 212.

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until the estate had been recouped failed for this reason: *In re Hatch* (1). The condition imposed by this court in *Dewhurst* v. *Salford Guardians* (2) was not objected to and its validity was not argued. Romer L.J.'s remarks in *Gissing* v. *Liverpool Corporation* (3) were obiter, and in any case were made in relation to a statutory scheme which contained different rules as to contribution from those in this scheme.

G. D. Johnston and *Pennyquick* for the directors' committeemen.

Harvey Moore for the members' committeemen.

Harman K.C., in reply, referred to *In re Musgrave* (4).

Lord Greene M.R.: This appeal raises questions of considerable difficulty in relation to the Great Northern Railway Co.'s superannuation scheme. The questions are of particular importance because, if certain of them are decided in a particular way, the result, as it appears to me, will be to throw this scheme into complete confusion. However serious the consequences may be in practice, we have nothing to do save to ascertain as best we can the rights of the parties in accordance with the true answers to the questions involved.

The learned judge has stated with admirable clearness the relevant facts which gave rise to the litigation, and there is no necessity to repeat them. He first considered the question whether war bonus, which was later described as war wage but which for convenience I will refer to as war bonus, was a matter in respect of which a deduction fell to be made under the superannuation scheme from the member's wage and a matter, consequently, which had to be taken into account in calculating his pension. The learned judge held that the war bonus should be included for the purpose of contribution and pension. The question then arose whether the plaintiffs could receive payment of the higher scale of pension without contributing to the fund the deficiency in their past contributions due to the fact that when they contributed the war bonus was not taken into account. That question the learned judge answered in favour of the plaintiffs, thinking it right to follow an earlier decision of Farwell J. I gather that, if it had not been for that decision, his judgment would have been the other way.

The first question, namely, whether the war bonus ought to be brought into calculation, is a very short question of con-

(1) [1919] 1 Ch. 351.
(2) [1925] Ch. 655.
(3) [1935] Ch. 1, 25–6.
(4) [1916] 2 Ch. 417.

struction : what is meant by the definition clause, r. 1, cl. (E) in the rules and regulations constituting the existing constitution of 1914? That definition is as follows : " 'Salary' "includes wages, and any bonus, house, or house allowance." That definition had appeared for the first time in the rules of 1906 and, of course, in 1906 and up to date when the rules of 1914 were made, no such thing as war bonus, as we know it, existed or was, apparently, in contemplation. There are two arguments in favour of the view that the war bonus is included. First, it is said that the definition itself uses the phrase "bonus." Indeed, it uses the phrase "any bonus." This payment, it is said, is called a bonus, or was originally called a bonus, and, therefore, it is included. As against that, it is argued that the phrase "any bonus" must be construed in relation to the type of payment known in the railway world or, at any rate in this railway company, as a bonus, at the date when the rules came into force. The only things then known as bonuses were special payments to traffic agents for securing tonnage of traffic over and above a certain datum line, a coal bonus to drivers, and so on. Speaking for myself, I do not think it necessary to go into that question, because, in my opinion, this war payment falls within the word "wages" itself. Its nature is not very precisely defined in the evidence, nor have we the documents before us under which it was brought into existence, but there is no real dispute as to its essential character. It was first introduced at the beginning of 1915 by way of a flat rate addition to the pay packet of all concerned in view of the rise in the cost of living. It was in that sense a temporary addition or an addition which was contemplated as lasting for an indefinite or unpredictable period. In point of fact, in the case of the shopmen, it still exists to-day to the extent, I think I am right in saying, of 16*s.* 6*d.* It was not at first taken into account for the purpose of calculating overtime or Sunday pay. That first took place in August, 1917, when the war bonus, which had then risen to 15*s.*, was re-named "war wage" and was taken into account thereafter in the calculation of overtime and Sunday pay. The scale of payment continued to rise until, in January, 1920, in the case of the operating grades, it had risen to 38*s.*, and under a later conciliation scheme it became merged in the revised basic wage subject to a small sliding scale variation depending on the variation in the cost of living. After that merger in the basic wage, of course, no question could arise with regard to it. It is said, however, that, so long as it

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remained a separate item with a separate description of its own and its own peculiarities, it was something other than wages within the true meaning of the definition. In my opinion, that argument is not sound. This war bonus appears to me to be in every true sense a wage. It was a flat rate and applicable to all grades for the simple reason that the rise in the cost of living affected all grades. It was put into a separate category of nomenclature because it was regarded as something which was not necessarily permanent, but something which, if the war came to an end within a reasonable time, might be expected to disappear. Those circumstances do not appear to me to make any difference to the true nature of this payment. I may take an analogy, not because it is an analogy which ought to be followed, but because I think it helps to explain the reasoning that appeals to me. Suppose a company which is in the habit of maintaining, let me say, a five per cent. dividend, earns in one year, or, perhaps in two or three years, some exceptional profits and then proceeds to declare a dividend of five per cent. and a bonus of, let me say, two per cent., that bonus is just as much a dividend as the five per cent. The reason why the directors choose to call it a bonus is that they want to mark it as something which is regarded not as the company's normal rate of dividend, but as something which may or may not be continued on a future occasion. Very much in the same way the parties concerned chose to treat this war bonus as something to be labelled in a particular way to show its special character in not necessarily being permanent. All those considerations appear to me to be irrelevant when looking at the true nature of this payment.

The conclusion to which I have come, is helped and, indeed, almost forced on us, by authority. In *Sutton* v. *Attorney-General* (1), a question arose under the Post Office Scheme in the last war under which members of the Post Office staff enlisting as office telegraphists in the Royal Engineers were allowed " Full civil pay in addition to military pay " when called up for service. The question was whether the phrase " full civil pay " included the war bonus which these employees would have received had they not joined the armed forces. The word, it is true, was " pay," but the question as dealt with in the House of Lords involved an examination of the true nature of the payment. Lord Birkenhead L.C. said (2): " I have no doubt that the war bonuses were part of the " civilian's pay. For good and sufficient reasons that part of

(1) 39 T. L. R. 294.

(2) 39 T. L. R. 297.

" pay which was intended to remain permanently was distinguished from that part which was granted only for a period " and was to cease when the need which occasioned it had " disappeared ; but it was none the less pay. He was entitled " to be paid for the time being for his services the total " amount of permanent pay and war bonuses. The term " ' bonus ' may, of course, be properly used to describe payments of grace and not as of right. But it nevertheless may " also include, as here, payments made because legally due, " but which the parties contemplate will not continue " indefinitely." Viscount Finlay said (1) : " If, in consequence " of an increase in the cost of living, a bonus had been given in " the shape of the payment of a lump sum, this would not, " ordinarily speaking, have been regarded as increase of pay. " But the method adopted for dealing with the situation was " not the payment of a lump sum. There was a temporary " increase in the remuneration of the officials affected, spoken " of as war bonus. It is, in fact, an increase of pay in respect " of war conditions." Then he quotes with approval the following words of Atkin L.J. : " For these reasons it appears " to me that ' pay ' covers the war bonus that was given to " civil servants by reason no doubt of the abnormal conditions " caused by the war. It is not an allowance. It is a wage."

Later, *James* v. *Tees Conservancy Commissioners* (2) raised a similar class of question under the statutory scheme set up for the Tees Conservancy Commissioners. The words that required interpretation were " salary or wages " and the question again was whether the war bonus which the commissioners were paying, and which in all essential particulars was of the same character as that with which we now have to deal, was or was not a wage. Maugham J. decided that it was, and when the matter came to this court Lord Hanworth M.R. agreed with his judgment, quoted one or more of the passages from the speeches in *Sutton's* case (3) which I have already quoted, and held that they really governed the case. Whether or not they strictly governed the case, the language being different, is immaterial. What is important is that the logic and reasoning of those speeches appear to apply irresistibly to the present case. I come, therefore, to the conclusion that the learned judge was right in saying that the war bonus ought to be taken into account.

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(1) 39 T. L. R. 297.
(2) 46 Ll. L. Rep. 19, 283.
(3) 39 T. L. R. 294.

The next question is whether or not the plaintiffs can claim a pension on that basis without bringing into account the deficit in their past contributions. The learned judge held that they were not so bound, and he based his decision on the judgment of Farwell J. in the later *Tees Conservancy* case (1). To understand that decision, one or two matters have to be remembered. First, the question was raised as the result of the decision of this court in the earlier case (2). The form of the proceedings before Farwell J. was that of an originating summons taken out by the commissioners with Mr. James, who was a pensioner, as a respondent, to determine the question whether the commissioners were entitled to recover the amount of the deductions which should have been made from the bonus for the purposes of the Act. They had taken the view that bonus was not to be brought into the calculation, and, accordingly, they had not deducted from the wages of the employees the amount which they ought to have deducted on the decision of this court in the earlier case. They wanted to know whether they could recover from the employees the amount which they should have paid in the past. Farwell J. held that there was no legal liability on the members to make any such payment, and that is the limit of the decision. It was not argued, nor on the face of the summons without amendment was it arguable, that a different principle applied, and that, whether or not there was a right to recover directly from a member, that member ought not to be allowed to take money from the fund without himself contributing to it what he ought to have contributed in the past. That is a very well-known principle of equity and is often referred to by reference to Kekewich J.'s decision in *In re Akerman* (3). That aspect of the matter was not dealt with by Farwell J., but he had before him two earlier cases in which, as it appears to me, that principle was clearly asserted to be applicable to superannuation cases of this character. It is worth looking at them in some detail. The earlier case was *Dewhurst* v. *Salford Guardians* (4), where the plaintiff, a retired employee of the guardians who had a pension scheme by virtue of the Poor Law Officers Superannuation Act, 1896, was claiming a declaration that the war bonus should be included in the computation of his pension, and he asked for an account and payment of what he said were the arrears of his pension.

(1) [1935] Ch. 544.
(2) 46 Ll. L. Rep. 19, 283.
(3) [1891] 3 Ch. 212.
(4) [1925] Ch. 655.

The main question discussed was whether or not the plaintiff could contract out of the scheme, but, in the course of his judgment, Warrington L.J. said (1): "What is asked is "a declaration, and an account of the money due to him "founded upon that declaration, and, in my opinion, he is "entitled to the costs here and below. But to the declaration "should be added the words 'subject to the obligation of the "'plaintiff to contribute to the common fund, as provided "'for by the Act'." The way that addition came to be made is obvious when the record in the House of Lords Appeal Book is examined. The statement of claim had asked merely for a declaration that the bonus should be included in calculating the pension and for an account and raised no question about the obligation of the plaintiff to contribute his arrears. Warrington L.J. saw that this was obviously wrong and that such a declaration could only be granted if qualified by a reference to the obligation of the plaintiff himself. That qualification was embodied in the order. Nobody objected to it, nobody argued that it ought not to be there, and when the matter went to the House of Lords no suggestion was made in the printed cases on either side that that addition to the order was in any way wrong. It is said that not very much weight ought to be attached to that because obviously nobody argued about it, and the addition was made by consent. In my opinion, that is wrong. The addition is just as much part of the order of the court as the rest of the order, and the court does not make a declaration by consent. It is the embodiment in the order of what the court considered the order ought to be and nobody argued to the contrary. It seems to me to be a matter of direct decision. Farwell J., dealing with that case, accepted an argument put before him by Mr. Gover that the explanation of that addition was to be found in the fact that the plaintiff had tendered the amount. With all respect, I cannot find a trace of a suggestion in the report of *Dewhurst's* case (2) that that was the reason why it was inserted. Manifestly it was inserted to bring the declaration into accordance with the well-known rule of equity to which I have referred. As the applicability of that rule was not argued before Farwell J. he was naturally placed in a position of some difficulty with regard to it, but I cannot agree with his view that that paragraph in the order was inserted with

(1) [1925] Ch. 672. (2) Ibid. 655.

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reference to anything save what the court regarded as the law applicable to the case.

The next case was *Gissing* v. *Liverpool Corporation* (1). That, again, was a superannuation case in which the board of guardians had not made the proper deductions. Eventually, after the plaintiff had agreed to make up some of the arrears caused by that failure to deduct, it was said against her that she was not in any event entitled to the benefit of the fund. In the course of that case it was said by Romer L.J. (2): "Payment of the annual contributions prescribed by s. 12 of "the Act of 1896 is no doubt a condition precedent to the "officer or servant becoming entitled to a pension, and the "pension will, of course, only be paid on the terms that the "pensioner makes good to the fund out of which the pension "is paid the sums that ought to have been paid into such "fund." That passage suggests two ways of looking at questions of this kind. One is whether or not the payment of contributions is a condition precedent to the right to claim benefit, and the other is whether the equitable rule in *In re Akerman* (3) is applicable. I think that in the present case the matter could be put on either ground, because it seems to me that, on the true view of the meaning of the rules, the right to a pension is conditional on the contributions having been paid. I do not take up time with investigating that aspect of the matter because on the equitable principle the same result is arrived at. Maugham L.J. at the end of his judgment (4) says: "I am of opinion that this judgment should "be reversed and that we should hold that Kate Gissing has "not forfeited her rights to superannuation allowance, and "subject to the payment in due course of any contributions "which may still be due from her she will be entitled, subject "to the provisions of s. 124, to the benefits of the super-"annuation scheme embodied in the Act of 1896." It is perfectly true that, having regard to the claim in that case and the circumstances in which it arose, that conclusion of Maugham L.J. did not appear in the order. There was no necessity for it to do so at that stage of the history of that lady and her pension. We have sent for the original order and we find that that is the case. Nevertheless, here again I find a recognition by Maugham L.J. of the need to apply that well-known principle to cases of this kind. That being so,

(1) [1935] Ch. 1.
(2) Ibid. 25.
(3) [1891] 3 Ch. 212.
(4) [1935] Ch. 33.

I do not think that we ought to disregard what happened in *Dewhurst's* case (1) and *Gissing's* case (2) in this court, and I cannot myself obtain any real guidance from Farwell J.'s decision.

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There is one other matter in this connexion to which, perhaps, I ought to refer. It was suggested that, unless a legal obligation to make the contribution could be found, the equitable principle would not apply because it could only apply where there was a debt, but here, it seems to me, there is a direct obligation on the member to contribute. It says in the definition clause "'Members' means persons who "contribute to or are entitled to benefits from the fund." Rule 12 says: "The fund shall consist of the contributions of "members and of the company." Then r. 28 says: "Every "member, so long as he continues in the employ of the "company, shall contribute to the fund in accordance with "the tables set forth in the appendix." There is an unqualified obligation to contribute. As a pendant to that there is r. 30: "The company shall contribute every half-year "to the fund out of their revenue a sum equal to the amount "which during the same half-year has been contributed "thereto by the members." It is clear that the phrase "The "company shall contribute" must import an obligation on the company to pay into the fund, and I cannot see how it can possibly be said that the precisely similar words in r. 28 imposing the obligation to contribute on the member do not mean the same thing. It is, however, said that the position is altered when we come to the intervening r. 29, by which: "The contribution of every member shall be deducted from "his salary and credited to the fund." I do not agree with the view that that qualifies the obligation imposed by r. 28 in the sense of limiting the obligation to contribute to the machinery of deduction. It seems to me that it is merely providing a piece of machinery by which the member's obligation to contribute can conveniently be made effective. It imposes on the company the obligation to make, it imposes on the member the obligation to suffer, deduction, and by that means his contribution is made. I cannot read it in any way as cutting down the obligation in r. 28. Whether that be so or not, it seems to me that, even if the only method of contribution provided for by the rule is that of deduction, that would not prevent the equitable principle from applying.

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(1) [1925] Ch. 655.

(2) [1935] Ch. 1.

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When that principle is applied the recipient is deemed to have in his hands the money that he is claiming up to the amount of the deficiency in his own payments. Precisely the same thing must apply to the present case even if the only thing that the member contracted to do was to pay by way of deduction. Look at it how you will, this member has not contributed enough. In so far as his contributions are defective in amount, he has under-paid, under-contributed, and it would be, it seems to me, grossly inequitable that a man in that position could be heard to say: " Although I have not " made the contributions by way of deduction which I ought " to have made, I am now going to say that the application " of the equitable rule is not permissible because that would " involve making me contribute otherwise than by deduction, " which is a thing I never contracted to do." That seems to me to be quite a wrong view of the way in which the equitable principle works. My decision does not result in forcing the plaintiffs to make an actual contribution otherwise than by way of deduction. If they come to make a claim then they have to do what is right and bring the fund up to its right level before they can claim to participate in it. For those reasons I am of opinion that the learned judge came to a wrong conclusion on this matter.

FINLAY L.J.: I am of the same opinion, and, although I am conscious that the points raised are points of difficulty and that on one of them we are differing from the learned judge, the matter has been so completely covered in the judgment of the Master of the Rolls, and I agree so entirely with his judgment, that I do not wish to add anything.

MORTON L.J.: I agree, and, for the same reasons as those which actuated Finlay L.J., I do not desire to add anything.

Solicitors: *W. H. Hanscombe; Kenneth Brown, Baker, Baker; Layton & Co.*

H. C. G.

Distinguished. *Re* HARVEY (*decd.*).
[1950] 1 All E.R. 491.

VAISEY J.

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Dec. 8.

In re JONES.

PUBLIC TRUSTEE *v.* JONES.

Settlement—Power of appointment—Power to appoint fund "for such "person or persons living at the death of my said son . . . . as "my said son shall by will or codicil appoint"—Validity.

A testatrix, by her will, gave a protected life interest in a trust fund to her son, and directed that after his death the fund should be held in trust "for such person or persons living at the death "of my said son . . . . as my said son shall by will or codicil "appoint":—

Held, that the power was a valid power exercisable by the son of the testatrix.

In re Byron's Settlement [1891] 3 Ch. 474; *In re Park* [1932] 1 Ch. 580 followed.

ADJOURNED SUMMONS.

By her will, dated December 17, 1929, Alice Jones constituted a trust fund in which she gave a protected life interest to her son, Ronald Kelsey Jones, and directed that after his death (in the events which happened) the fund should be held in trust "for such person or persons living at the death of my said "son . . . . as my said son shall by will or codicil appoint." The testatrix died on September 17, 1932, and her son died on October 14, 1941. A summons was taken out by the Public Trustee, who was the executor and trustee of the will, to determine whether the direction in the will was or was not a valid power of appointment.

Droop for the Public Trustee.

Wilfrid Hunt for persons interested in the trust fund in default of appointment. This case differs from *In re Byron's Settlement* (1) and *In re Park* (2) as there is no exclusion of objects in this power of appointment and the class capable of taking may be too wide. The power is, therefore, void.

Winterbotham and *Hillaby* for persons claiming to be interested under the trusts of an appointment made by the son in exercise of the power were not called on to argue.

VAISEY J. The question, on which there appears to be no direct authority, is whether or not the words of the provision created a valid power of appointment exercisable by the son.

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(1) [1891] 3 Ch. 474.

(2) [1932] 1 Ch. 580.

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Clearly, the power is not a general power, seeing that the objects of it are limited to the class of the persons living at the death of the son. On the other hand, it could hardly be described as a special power of the ordinary kind, for the class in question extends to the whole human race living at a particular time, that is to say, at the son's death. I have, however, been referred to a passage in Jarman on Wills, 7th ed., vol. 2, p. 763, where the learned author points out that it is not accurate to divide powers of appointment into two classes, general and special, and that the essence of a general power is that the donee of the power can appoint to whomsoever he pleases. He further points out that s. 27 of the Wills Act, 1837, uses not the words " general powers," but the words " power to " appoint in any manner [the donee] may think proper," so that, even if the donee can appoint to himself, yet, if certain persons are excluded as objects of the power, such a power is not of the nature of the power referred to in s. 27. It would seem that there is a class of power which is not special in the sense that there is a distinct class of " objects " and yet is not general, and that to this intermediate class belong powers under which the donee can appoint to any person or persons other than himself, his executors or administrators, or other than certain classes of persons. The Legacy Duty Act, 1796, it is true, uses language which implies that, for the purposes of that Act, the two classes of power, special and general, were meant to include all possible cases, and in *Platt* v. *Routh* (1) it was, consequently, held that limited powers of the kind to which I have referred were, for the purposes of that Act, general powers.

I now turn to the authorities. In *In re Byron's Settlement* (2) real estate was settled on trust to permit the settlor's daughter to receive the rents for her separate use and on further trust " for such person or persons (not being her present husband " or any friend or relative of his) and for such estate or " estates " as she should by deed or will appoint. Kekewich J. held that the power of appointment was not a power to appoint " in any manner " she might think proper within s. 27 of the Wills Act, and, therefore, was not exercised by her general devise. He said (3) : " Upon the construction of the Act, and " upon principle, it appears to me that we have a power not " general—that is to say, it is not a power to appoint ' in any

(1) (1840) 3 Beav. 257.
(2) [1891] 3 Ch. 474.
(3) Ibid. 481.

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" ' manner ' the donee may think proper, but it is a power to " appoint ' in any manner ' with an exception, which exception " destroys the generality of the power." In the second case, *In re Park* (1), the objects of the power were unlimited except by the exclusion of the appointor, and Clauson J. held that the power, though strictly neither a general nor a special power, was, nevertheless, a valid power.

In each of the cases cited, it will be observed that the generality of the objects was limited by an exclusion. In other words, from the totality of all possible objects, certain specified objects were taken out. In the present case, to which I understand there is nothing similar in the reports, the class is defined affirmatively as consisting of all individuals living at the death of the appointor. I construe the words as equivalent to a subtraction from the generality of objects (i.) of all corporate bodies, charities and the like, and (ii.) of all individuals not actually in existence at the moment of the death of the appointor. Accordingly, although it is neither a general power nor a special power, I think that, on the authority of the two cases to which I have referred and on principle, I am bound to hold that it is, nevertheless, a power permissible to be created, and I, therefore, declare, in answer to the question put to me, that there is here a valid power of appointment.

Solicitors: *R. Raymond Pollard & Co., for N. Ramsay Murray, Chiswick; Vizard, Oldham, Crowder and Cash; Champion & Co.*

(1) [1932] 1 Ch. 580.

J. L. D.

In re BERKELEY (EARL), DECD.

BORRER *v.* BERKELEY (No. 2).

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Dec. 12, 13.

Lord Greene M.R., Finlay and Morton L.JJ.

Will—Annuity free of tax given before September 3, 1939—*Confirmation by codicil after that date—" Stated amount "—Variation—Finance Act,* 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.

A testator by his will, dated November 10, 1936, in exercise of a power of appointment under an earlier settlement, appointed to his wife an annual sum of 1,200*l.*, without any deduction except on account of death duties and income tax. He also gave to his

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stepdaughter, free of all duties, an annuity of 1,500*l.* for her life, free of income tax at the standard rate. To each of his executors one of whom was his wife, he gave an annuity of 200*l.*, free of all duties and income tax. By a second codicil, dated December 3, 1938, the testator gave his wife " an annuity of such amount as " may in any or every year after my death be required to make up " to the total sum of 5,000*l.* clear of all death duties and income " tax the annual net income to be received by her in that year " under my said will (including the appointment) and under my " marriage settlement," and he provided that the annuity of 200*l.* was to be taken into account, and that the annuity given by the codicil was itself to be free of all duties and income tax, including sur-tax. A fourth codicil, dated September 14, 1940, provided that the wife's annuity was to be paid in priority to all other annuities, and the stepdaughter's annuity in priority to all except that of the wife. It also secured those annuities by charging them on certain specified property of the testator :—

Held, (1.) that the principle id certum est quod certum reddi potest applied to the annuity given by the second codicil, and that since its amount in any given year could be ascertained by the application of arithmetic to a definite formula it was a " provision " for the payment of a stated amount free of income tax " within the meaning of s. 25, sub-s. 1, of the Finance Act, 1941 ; (2.) that the variation required to take such a provision out of the subsection must be a variation in the provision for tax-free payment, and that neither (*a*) a subsequent recognition of the liability, nor (*b*) a mere variation of the amount, nor (*c*) a direction (as in the present case) affecting priorities, or providing security, was such a variation as the section contemplated ; (3.) that the "stated " amount " was not the 5,000*l.* to which the wife's net income was to be made up, but " x," namely, the amount in each year which the trustees must pay to make up the net income ; (4.) that accordingly s. 25, sub-s. 1, of the Finance Act, 1941, applied to the annuity given to the wife by the second codicil.

APPEAL from Cohen J.

This appeal (brought pursuant to leave granted in *In re Berkeley (Earl), decd. Borrer* v. *Berkeley (No.* 1) (1)) raised several questions as to the application of s. 25 of the Finance Act, 1941 (2) to the will and codicils of the late Earl of

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(1) Ante, p. 1.

(2) The Finance Act, 1941, s. 25, sub-s. 1 : " Subject to the provisions of this section, any " provision, however worded, for " the payment, whether periodically or otherwise, of a stated " amount free of income tax, or " free of income tax other than " surtax, being a provision which " —(*a*) is contained in any deed or " other instrument, in any will or " codicil, in any order of any court, " in any local or personal Act, or " in any contract, whether oral or " in writing ; and (*b*) was made " before September 3, 1939 ; and " (*c*) has not been varied on or " after that date, shall, as respects " payments falling to be made

Berkeley, who died on January 15, 1942. All the testator's testamentary dispositions, except the fourth codicil, were dated before September 3, 1939. By cl. 2 of his will, dated November 10, 1936, he exercised a power of appointment conferred upon him by a settlement of June 8, 1888, in favour of his wife, the respondent, Lady Berkeley, and appointed to her an annual sum of 1,200*l.* without any deduction except on account of death duties and income tax. By cl. 23 (*b*) he gave to his stepdaughter, the respondent, Sybil Deane Jackson, free of all duties during her life an annuity of 1,500*l.* free of income tax at the standard rate. By cl. 24 (*a*) he gave to his executors, one of whom was his wife, if they should accept the office, an annuity of 200*l.*, free of all duties and income tax. Under the will, therefore, Lady Berkeley became entitled to an annuity of 1,200*l.* gross under the appointment, and an annuity of 200*l.* net. The first codicil contained nothing relevant to the present questions. The second codicil was dated December 3, 1938. Under cl. 1 the testator gave to Lady Berkeley during her life " an annuity of such amount " as may in any or every year after my death be required to " make up to the total sum of 5,000*l.* clear of all death duties " and income tax the annual net income to be received by her " in that year under my said will (including the appointment " made by cl. 2 thereof) and under my marriage settlement " (which I hereby confirm) dated November 6, 1924." In cl. 2 he provided that in computing that annuity the annual sum of 200*l.* given by cl. 24 of the will was to be taken into account. By cl. 3: "The said annuity" (i.e., the annuity given by cl. 1 of the codicil), " shall itself be free of all duties " and income tax." Clause 5 gave directions as to the computation of the relief to be given to his wife in respect of income

" during any year of assessment, " the standard rate of income tax " for which is ten shillings in the " pound, have effect as if for the " stated amount there were sub- " stituted an amount equal to " twenty twenty-ninths thereof."

Section 27, sub-s. 1: " For the " purposes of the provisions of this " Act relating to tax-free pay- " ments— . . . . (*b*) the expres- " sion ' a stated amount ' includes " a stated fraction of the gross " amount of any specified income " (that is to say, of the amount of " that income before income tax " has been charged thereon, " whether by deduction or other- " wise), but does not include a " stated fraction of the net amount " of any specified income (that is " to say, of the amount of that " income after it has been charged " to income tax, whether by " deduction or otherwise)."

tax; and by cl. 6 "income tax" was to include sur-tax. Under the marriage settlement of 1924, Lady Berkeley became entitled, on his death, to certain income, subject to tax. The fourth codicil, dated September 14, 1940, affected the priorities of the annuities. The annuity to Lady Berkeley was to be paid in priority to all other annuities, and that to Miss Jackson in priority to all except Lady Berkeley's. There were certain provisions charging those annuities on property specified, and thus securing them.

The plaintiff, who, with Lady Berkeley, was trustee of the testator's estate, took out an originating summons for the determination, inter alia, of the question whether s. 25, sub-s. 1, of the Finance Act, 1941, applied to Lady Berkeley's annuity, or whether the fourth codicil had the effect of excluding the provisions of that section.

On May 19, 1943, Cohen J., before the decision of the Court of Appeal in *In re Sebag-Montefiore* (1) held that he was bound by the decision of Simonds J. in *In re Tredgold* (2) to hold that the section was excluded. After *In re Tredgold* (2) was overruled by *In re Sebag-Montefiore* (1), two defendants (other than Lady Berkeley), who had life interests in residue, appealed by leave.

J. H. Stamp and *J. V. Nesbitt* for the appellant-defendants, R. G. W. Berkeley and R. J. G. Berkeley.

Wilfrid Hunt for the respondent Lady Berkeley.

Hewins for the respondent Sybil Deane Jackson.

Eardley-Wilmot for the trustees.

The arguments of counsel appear fully from the judgment.

LORD GREENE M.R.: This appeal raises several short points on the application of s. 25 of the Finance Act, 1941, to the will and codicils of the late Earl of Berkeley. His testamentary dispositions, with the exception of the fourth codicil, were all executed before September 3, 1939, which is the crucial date mentioned in the section. The fourth codicil was executed on September 14, 1940—that is to say, after the crucial date—and it contained a confirmation of his will as altered by the earlier codicils. The question whether such a confirmation has the result of importing the relevant provisions of an earlier instrument into the confirming codicil

(1) [1944] Ch. 331. (2) [1943] Ch. 69.

was decided by this court in *In re Sebag-Montefiore* (1), and so far as this court is concerned it is settled that where there is such a confirmation the relevant provisions are not to be regarded as having been made by the confirming codicil, but as having been made by the will or earlier codicil, as the case may be. Mr. Hunt, for the Dowager Countess of Berkeley, wished to keep the point open in case there should be an appeal to the House of Lords.

[His Lordship stated the relevant provisions of the will and codicils, and continued :] The meaning and effect of the dispositions in the second codicil are, in my opinion, clear. They are the bequest of an annuity. The amount of the annuity is to be ascertained by reference to the other income of Lady Berkeley, which is specified in cl. 1, and the bequest in respect of which I apprehend duty would be payable is a bequest of an annuity sufficient to make the income of Lady Berkeley from those other sources up to 5,000*l.* a year net; and, of course, that annuity itself was a net annuity and not a gross annuity. Therefore it amounts to this : It is an annuity of such a sum as, after deduction of tax, will make up to Lady Berkeley the amount of her income from those other sources to a figure of 5,000*l.* The questions which arise I will deal with in what seems to me the most convenient order. I do not propose to read the language of s. 25, nor do I propose to say anything, except in passing, about its manifest object, because that has already been dealt with in the judgments delivered in *In re Sebag-Montefiore* (1). It is said in the first place that the section does not apply because the annuity given by the second codicil to Lady Berkeley is not a " stated amount." In my opinion, that argument is erroneous. The right of Lady Berkeley under the codicil is to receive an annuity, and the amount of that annuity will be precisely ascertained at the appropriate time, and, as soon as it is ascertained, the obligation of the trustees to pay it to her comes into operation. There is no difficulty in ascertaining what the amount is to be in any particular fiscal year. But in the argument presented to us by Mr. Hunt he laid emphasis on the word " stated " and contended that that word can only be satisfied where the amount is definitely fixed by the provision in question, and that if the amount is one which has to be ascertained by reference to some formula which may produce a different amount in different years, it cannot be a " stated " amount.

(1) [1944] Ch. 331.

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When one remembers what the manifest object of this legislation was, it would, I think, be true to say that such a construction would lead to an anomalous and unjust result. Covenants in deeds and provisions in wills for the making up of a person's income to a named figure are extremely common. So far as the mischief at which the Act was directed is concerned, the burden of increased taxation upon the person who, or the estate which, is liable to pay an amount of that character is precisely the same as the burden upon the payer or the estate in the case where the actual figure is inserted in the document. If the legislature intended to differentiate the two cases and grant relief to the one and withhold it from the other, it was doing something for which no intelligible explanation could be given. But, in my opinion, construing this phrase in a reasonable way, no such force ought to be given to the word "stated." The document does state the amount, because it determines precisely the measure of the liability. The actual quantification is a pure matter of arithmetic, because all the factors will be known.

Mr. Hunt argued that unless the word "stated" is to be given the meaning which he attributed to it, it is superfluous, and the legislature might just as well have said "any amount." In order to construe this section in a sensible way, I would be prepared to construe it against Mr. Hunt's contention even if that were the result. But Mr. Stamp, in his reply, pointed out an obvious case, which could not be said to be a stated amount; for instance, a case where trustees are given a discretion to apply income for the maintenance of infants. There the amount to be paid could in no sense be called a stated amount, because there is no method of ascertaining it. The amount rests locked up in the minds of the trustees, and the decisive factor which fixes it is the way in which the trustees decide to exercise their discretion. It seems to me that the principle of id certum est quod certum reddi potest is applicable to this case, and where you have, as you have here, an amount described by reference to a formula and readily ascertainable by means of that formula, the amount is a stated amount.

That is the view which has been taken in earlier cases by Uthwatt J. in *In re Bird* (1) and by Lord Keith in the Scottish case of *Holmpatrick* v. *Ainsworth* (2). The latter was a case in which there was a covenant by a divorced husband to pay his wife "such sum as will, when added to the net income

(1) [1944] Ch. 111.

(2) 1943 S. C. 75, 78.

" arising from the trust fund in that year, leave a sum of 1,200*l.* after deduction of income tax at the current rate." One of the questions argued in the case was whether or not that was " a stated sum." The Lord Ordinary, Lord Keith, said this: " If the calculation falls to be made, as here, with " reference to a constant, in the present instance 1,200*l.*, it " can, I think, be said that there is an obligation to pay a " stated amount. The statute does not say a fixed amount, " or a definite amount, or an amount certain. It says a " stated amount, and I think 1,200*l.* less *x* "—x represented the income from the trust fund mentioned—" is a stated " amount although the value of x may not be precisely known " when the obligation is undertaken, and may vary from year " to year." Then he says this: " I think, indeed, it might be " said that the whole or a proportion of a quite indefinite " sum, as for instance a share of profits, could be regarded as " ' a stated amount,' although the limit of liability in such " a case must be quite uncertain "; and he refers to the definition section in the Act, s. 27, sub-s. 1, para. (*b*), which provides: " The expression ' a stated amount ' includes " a stated fraction of the gross amount of any specified " income, but does not include a stated fraction of the net " amount of any specified income." That clearly means that if there is a covenant to pay free of tax, say, one-quarter of the income derived by the covenantor from a specified source, that would be covered by the section. Mr. Hunt relies upon that interpretation clause, because he says it shows that income of that character would not, apart from the interpretation clause, be regarded for the purposes of the section as a stated amount. I cannot accept that argument. It appears to me that this particular part of the definition clause was inserted for the purpose of making it quite clear what did and what did not fall within the Act, where there is a covenant to pay a fraction of specified income. The important part of paragraph (*b*) is, I should have thought, the negative part which excludes fractions of specified income in the case where the fraction is the fraction of a net and not a gross income.

I might further point out that if Mr. Hunt's argument is correct, further most remarkable results would follow. A man who had covenanted to pay a fraction of his income from some employment or profession would be entitled to the benefit of the section, although the income was unascertainable until after it was earned, and in consequence the amount payable under the covenant was left uncertain until the amount of the specified income was ascertained. I ask myself: Why should such a covenant be given the protection of the section and a covenant to pay a sum calculated by reference to a different type of income, also fluctuating in amount, be excluded? I can see no reason whatever for drawing any such distinction, in justice or common sense, and I do not find myself compelled to adopt a construction which would lead to such results.

I leave aside for the moment, to take it later in its logical order, the further question raised as to what in the present case is the stated amount to which the section refers, and I will now deal with the next argument of Mr. Hunt, which was to the effect that the section did not apply because the fourth codicil had, on a date after September 3, 1939, varied the provision contained in the second codicil. He says that under the fourth codicil the position with regard to these annuities was varied in two material respects, viz. (1.) in respect of priorities and (2.) in respect of security. This, he said, might in practice result in an improvement of the position of the annuitants, because it might be the case that apart from those provisions in the fourth codicil they would receive less than they will now do. That, he says, is a variation within the meaning of s. 25, sub-s. 1, para. (*c*). That paragraph lays down, as one of the requirements, that the provision for payment of a stated amount free of income tax should not have been varied or on after September 3, 1939. In my opinion that argument also fails. The thing that requires to be varied in order to exclude the operation of the section is a provision for the payment of a stated amount free of income tax. That provision in the present case, following *In re Sebag-Montefiore* (1), was contained in the second codicil. The fourth codicil does not vary it. It remains unaffected. All that has happened is that certain additional provisions have been imported which make no difference to the original provision, save that they give to it a certain security and certain priority. The question arises: Is that a variation of the kind referred to in the section? In my opinion it is not. Here again, by way of preface, I may point out the remarkable results which would follow if the argument were correct. It is to be remembered that the language of this section is directed not merely to provisions in wills, but to provisions in deeds,

(1) [1944] Ch. 331.

orders of the court, Acts of Parliament, and contracts; and the word "provision" is, of course, a comprehensive word which is used to cover the dispositions contained in any of those documents or, in the case of contracts, if oral, then in the oral contract. Let me test the argument by taking the case of a covenant. Let me assume a covenant made before September 3, 1939, to pay a tax-free annuity to AB. In a later deed, dated after September 3, 1939, the covenantor brings in certain security to secure the annuity. So far as he is concerned, he is just as much subject to the burden of the high taxation which this section was intended to adjust as if he had never entered into that second deed at all. The amount of cash which he would have to pay out of his pocket would be precisely the same; and again I can see no reason why the legislature should have said that the man who subsequently gave security should be excluded from the section, and the man who did not give security should be benefited by its provisions. But, quite apart from that, the word "varied," in my opinion, is to be confined to a variation of the particular provision specified in sub-s. 1, namely, variation of the provision for the payment of a stated amount free of income tax.

In *In re Sebag-Montefiore* (1) I used certain words in reference to one of the points in that case, where a tax-free annuity given in the will was increased to a larger sum by an annuity in a codicil executed after September 3, 1939. The question was whether that increase of the original annuity was such a variation of the original disposition of the smaller annuity as to exclude the totality of the annuity from the benefit of the section. What I said was this: "The 'variation' referred "to in the sub-section must, I think, be a variation of the "provisions contained in the original disposition for payment "free of income tax. A mere variation in the amount of the "tax free sum does not appear to me to be sufficient, and "I can see no reason why the legislature should have said that "it was. If mere increase of the amount is a variation, mere "decrease also must be a variation." MacKinnon L.J. expressed the same opinion. It is said that those observations were not necessary to the decision and were mere dicta. I do not myself agree with that view; but assuming that they were, I am nevertheless disposed to think that they are correct.

In the earlier case of *Dudley* v. *Dudley* (2) in this court,

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(1) [1944] Ch. 331, 338, 340.

(2) [1944] K. B. 264, 268.

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I said this : " It might have been expected that the sub-section would exclude from its operation any case where a covenant entered into before September 3, 1939, had been recognized after that date to be still binding. It would naturally be thought that, if the parties had affirmed the covenant after September 3, 1939, that would be sufficient to take the case out of the sub-section, because it could have been said that the parties, with the practical certainty of increased taxation before their eyes, had, nevertheless, affirmed the liability originally cast on the covenantor. The legislature, however, has not thought fit to word the sub-section in that way, and to take a case out of it, a variation, and not merely a confirmation, is needed. A mere re-statement or confirmation of an existing obligation cannot be treated as a variation of the provision within the meaning of the sub-section." Since expressing that view, I have had occasion to consider this section again. My observations were based on the hypothesis that the legislature might reasonably have excluded from the benefit of the section a covenantor, to take that example, who after September 3, 1939, had recognized his liability. On consideration, I have come to the conclusion that the legislature was not proceeding on that basis at all, and the omission of any reference to confirmation clearly proves that. If subsequent recognition had been thought by the legislature to be sufficient to take a case out of the section, it would surely have said so, and it would have been a very curious result if a mere variation in amount could be regarded as taking the case out of the section because it impliedly recognized the obligation to continue tax-free payments, whereas an express confirmation would not take it out. That led me to think that, as I said in *In re Sebag-Montefiore* (1), the variation which is referred to is not a variation regarded as, so to speak, an implied recognition of the obligation to pay tax free, but a variation of the tax free provision itself. It might be said that a variation of the stated amount without any variation of the tax free provision would satisfy the words ; but, in my opinion, that leads to an extraordinary result, because, as I have already pointed out, it would mean that if a man in his subsequent codicil reduces an annuity, or increases it, his estate would thereby lose the benefit of this section. It seems to me that the more one thinks of this, and examines the results of the various views, the more likely does it appear that what I

(1) [1944] Ch. 331, 338, 340.

said, and what MacKinnon L.J. said, was right. Moreover, if the legislature had proceeded on the footing that mere recognition, express or implied, of the existence of the tax free provision at a date after September 3, 1939, should be sufficient to exclude the section, it would have led to a difficulty and an injustice, which explains quite clearly to my mind why it was the legislature did not proceed on that basis. The point is this: The crucial date laid down in the section, September 3, 1939, was long before the coming into force of this Act of Parliament, which received the Royal Assent on July 22, 1941. No doubt there were many cases in which a person who had covenanted, or a testator who had provided, for the payment of an annuity had between September 3, 1939, and the date when the Act came into force, in some way or another acknowledged his liability. It would have been grossly unfair to have said to a man who had done that: "You shall "be deprived of the benefit of the section because, without "having the faintest idea that any legislation of this kind "would ever be passed, you acknowledged your covenant." That, I venture to think, is the reason why the legislature did not make express or implied recognition of a liability a thing which would operate to exclude the benefit of the section.

I come, therefore, to the conclusion that the variation required is a variation of the tax-free directions of the provision in question. But assuming that I am not right on that, and that it is open to this court to think otherwise, I am clearly of opinion that the mere giving of priority and the addition of security do not amount to a variation where the amount and the tax free direction are left unimpaired.

That disposes of the arguments that the section does not apply. It remains to consider what, in the case of Lady Berkeley, is the stated amount. Mr. Stamp and Mr. Nesbitt argued that the stated amount was the 5,000*l.* net to which the income of Lady Berkeley is to be brought up under the second codicil. The contention on the other hand is that the stated amount for the purpose of the section is that unspecified, but ascertainable, amount which the estate has to pay out in cash in order to make up the income to 5,000*l.* net. That sum I can refer to as x. Is the stated sum 5,000*l.* or is it x? In my opinion, it is quite clearly x. X, as I have pointed out, is the annuity which has been bequeathed, or, rather, x as "grossed up" is the annuity which has been bequeathed.

X is the sum which the estate has to find and pay over. That is the sum in respect of which tax is leviable by the revenue. To take the case again of a covenant under a deed, if this annuity had been provided by way of covenant, and if in any year the covenantor paid it out of income not brought into charge, he would be accountable to the revenue in respect of the tax referable to it. The tax which would be referable to it would be the tax upon the sum which he actually paid as " grossed up " for income tax purposes, and he would have to account for that tax to the revenue. That is the payment which the covenantor would have to make to the covenantee. The covenant would be a covenant to pay the gross sum, but the covenantee would only receive the net sum and the revenue would receive the rest. The relief given by the section so far as the covenantor is concerned would, one would expect, be quite plainly relief in respect of the actual payment which he is called upon to make under the covenant. If the view put forward by Mr. Stamp and Mr. Nesbitt is correct, the relief that he would get would not be relief in respect of something which he pays ; it would be relief in respect of 5,000*l.*, which ex hypothesi is not the payment which he covenants to make. The payment that he covenants to make tax free is x ; and I can see nothing more inequitable than to grant to a covenantor relief from taxation so as to throw on to the covenantee part of the burden in respect of a sum which the covenantor is never paying at all.

This conclusion is I think supported by the language of sub-s. 4, which says that " If, in the case of a payment to " which sub-s. 1 of this section applies, the relations of the " payee and payer are such that the payee is accountable to " the payer for so much of any relief from income tax which he " receives as is ascribable to the payment," then the liability of the payee to account is adjusted as mentioned in the subsection. Who is the payee and who is the payer ? In the case of a covenant, the payer is the covenantor, and the payee is the covenantee. In the case of a will, the payers are the trustees ; the payees the annuitants. What is the " payment " referred to ? That must be, surely, the actual payment. This section is dealing with hard facts, payment of hard cash, and the payment in the case I have put is clearly, I should have thought, the payment which in fact the covenantor or the trustees, as the case may be, are called upon to hand over to the annuitant, and in so far as the payee can recover income

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tax ascribable to that payment and is bound to account for it, then the provisions of the sub-section apply. I cannot make this section work on any other construction than that which I have indicated. Mr. Stamp, however, argued that in the present case the stated amount is the 5,000*l*. He said: "Here "is outside income. Here is a provision for paying in effect "the income tax on that income. The provision for payment "of that income tax is a provision for the payment of a stated "amount, to wit 5,000*l*. free of income tax." I cannot follow that argument. It is no fault of Mr. Stamp's. If fault there be, it is mine. The section does not say "any provision for "payment of income tax in respect of a stated amount." It speaks of a provision for payment of a stated amount free of income tax, and the only provision for payment of a stated amount free of income tax is the provision contained in the gift of the annuity itself. The fact that the quantum of that annuity is to be ascertained by reference to, among other factors, the tax deducted in respect of the other sources of income appears to me to be irrelevant. That is merely the formula by reference to which the amount of the annuity given by the second codicil is to be ascertained. As I have pointed out, the effect of the second codicil is merely to give an annuity of such a gross amount as after deducting the income from other sources will leave a sum of 5,000*l*. net, free of all income tax. That is a pure formula for ascertaining the amount. It does not alter the character of the gift as a gift of an annuity. The amount of the annuity appears to me quite clearly to be the "stated amount free of income tax" to which the section is referring.

The Scottish case *Holmpatrick* v. *Ainsworth* (1) to which I have referred deals to a certain extent with that question, too, because a precisely similar question arose in that case. The Lord Ordinary had decided that the stated amount was the difference between the upper limit of 1,200*l*. and the amount of the income from the other sources. That was reversed on appeal to the Inner House, but, as I understand the judgments, the ground upon which it was reversed was a very special one. It was this: The agreement in question contained a release by the husband, in favour of his late wife, of his life interest under the marriage settlement. By that release it was said he provided an income for his wife which she would not otherwise have had, and by a later clause in the

(1) 1943 S. C. 75, 83.

deed he made the provision which I have already mentioned for an annuity to her sufficient to bring her net income from the trust fund up to 1,200*l.* What the Lord Justice Clerk said is this: "Now the plain fact is that, by the combined "effect of articles I. and II. of the indenture of agreement, "there is 'provided' to the pursuer 1,200*l.* free of tax, and "that every penny of this 1,200*l.* and of the tax effeiring "thereto is 'provided' by the defender. The pursuer gets the "trust income by virtue of the defender's surrender of it in her "favour, and it is to be noted that this surrender affects the "*gross* income and not the *net* income. The pursuer gets "the balance of the 1,200*l.* net by direct payment from the "defender." There is no necessity for us in this court to consider whether that is a conclusion which we ourselves would have arrived at, but the decision, based as it is on that special provision of the document in question, affords no assistance to us in the decision of this case. There is in the dissenting judgment of Lord Jamieson this passage which, with great respect, I adopt, as in agreement with my own views. He said this: "In short, there should be some equality of "sacrifice. The net income from the trust funds may vary "to some extent from year to year. The nearer it approximates to the sum of 1,200*l.*, the less the defender will have to "pay over to the pursuer, and the less he will have to account "for to the Inland Revenue if the payment is not made out of "income already brought into charge. Yet, if his contention "were to receive effect, the pursuer would, regardless of the "amount he had to provide as a supplement, suffer a constant "reduction to twenty twenty-ninths of the sum of 1,200*l.* "On the other hand, if only the supplementary provision "comes within the operation of the section, the burden will be "shared by both pursuer and defender." (1). Leaving aside the particular provisions of that deed, and applying those words to the present case, they appear to me, if I may respectfully say so, to embody the utmost good sense and sound construction.

Mr. Nesbitt submitted an additional argument, based on this proposition. He said: When you look at the provisions of the testamentary dispositions of the testator you find that in fact the whole of the income from other sources, which was to be made up under the second codicil to 5,000*l.*, had been provided by the testator. So far as regards the 1,200*l.*

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(1) 1943 S. C. 75, 96.

annuity appointed to his widow, the testator had provided that under the settlement of 1888; he had also provided the income under his settlement on his marriage with the present dowager. The annuity of 200*l.* again was provided by him under his will. The result, therefore, Mr. Nesbitt argued, was that by his testamentary dispositions the testator had provided a stated amount free of income tax, the stated amount being an amount made up of the income from the other dispositions and the supplementary payment to be made under the second codicil. The income from those other dispositions had been provided, said Mr. Nesbitt, by the testator. In my opinion, that is putting a very strained construction on these words. The fact is that the provisions under which that other income, except the 200*l.*, arose were quite separate and antecedent to the documents that we have to consider, which are the documents containing the provision of a stated amount free of income tax. The marriage settlement was one; the power of appointment was the other. The exercise of a pre-existing power of appointment does not appear to me to amount to a provision for the payment of a stated amount free of income tax. If that appointment is an appointment of a gross sum, how can it be said that it is a provision for payment of a stated amount free of income tax? One cannot run together all these documents, two settlements and the power of appointment, join them up with the provisions of the second codicil, and say " The whole of " these together amount to the provision of a stated amount " free of income tax." If that were legitimate, the most extraordinary difficulties might arise when one comes to the question of dates, because one might get some part of a composite series of documents executed before and some after September 3, 1939. The section, it appears to me, is a sjmple and intelligible section directed to the case where one finds in a document a provision for payment of a tax-free sum, and then all you have to do is to look at the date of that document, and the Act applies or does not apply, according as the document falls on one side or the other of the line.

That, I think, disposes of all the arguments that have been addressed to us. I conclude by saying this: When this matter came before Cohen J. it was not argued on any of the points that I have mentioned, for the reason that *In re Sebag-Montefiore* (1) had not then been decided by this court. Following

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(1) [1944] Ch. 331.

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the earlier decision of Simonds J. (as he then was) in *In re Tredgold* (1), which he followed in *In re Sebag-Montefiore* (2), it followed that the Act had no application to this case, owing to the confirmation of the will and earlier codicils contained in the fourth codicil. Accordingly, none of the questions which fall for our decision were debated in the court below. The decision of this court in *In re Sebag-Montefiore* (2) has thrown all those questions open, and my decision on them is that the appeal should be allowed, and the appropriate declaration made as to what is the stated amount. I think there will have to be a declaration of that.

FINLAY L.J.: I agree.

MORTON L.J.: I entirely agree with the conclusions which have been stated by the Master of the Rolls, and I do not desire to add anything in regard to the two questions whether there is in the second codicil a provision for the payment of a stated amount free of income tax and, if so, what is the stated amount. As to the question whether the provision for the payment of a stated amount free of income tax is or is not varied by the fourth codicil, I only desire to say that I rest my conclusion entirely upon the facts of this particular case. In so saying I do not wish to intimate that I dissent in any way from anything which has fallen from the Master of the Rolls, but merely to make it plain that the only matter on which I have formed a conclusion of my own is the question directly before us, namely, whether the fourth codicil does vary the provision in the second codicil within the meaning of s. 25 of the Finance Act, 1941. On that point I entirely agree with what has fallen from the Master of the Rolls.

Appeal allowed.

Solicitors: *Garrard, Wolfe & Co.; Field, Roscoe & Co.; Culross & Co.; Boodle, Hatfield & Co.*

(1) [1943] Ch. 69.

(2) [1944] Ch. 331.

J. W. H.

tum of LORD GREENE, M.R., at
129, *applied*. *Re* SCARISBRICK'S
.I. TRUSTS. [1950] 1 All E.R. 143.

Applied. *In re* SCARISBRICK [1950] 1 Ch. 226

Approved. OPPENHEIM *v*. TOBACCO SECURITIES TRUST
[1951] A. C. 297

scussed. GIBSON *v*.
UTH AMERICAN
ORES.
1949 1 Ch. 572

In re COMPTON.

POWELL *v.* COMPTON AND OTHERS.

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Nov. 15, 16;
Dec. 20.

Lord Greene
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Finlay and
Morton L.JJ.

Considered. *In re* SCARISBRICK [1951] 1 Ch. 622

Charity—Charitable bequest—Trust for education of descendants of three named persons—Twenty-eight beneficiaries living—Validity.

A testatrix by her will provided: "…. the money …. is "to be …. invested …. under a trust for ever …. for "the education of C. and P. and M. children but C. and P. children "are to take the preference as scholarships for the time thought "best by the trustees not over the age of twenty-six years. It is "not to be used as a pension or income for anyone and is to be "held as scholarships at the pleasure of the trustees. It is to be "used to fit the children to be servants of God serving the nation "not as students for research of any kind." She defined C. P. and M. children as "the lawful descendants of three named persons." At the date of the summons there were living twenty-eight descendants of these persons under twenty-six years old:—

Held, that the trust was not a valid charitable trust, because the beneficiaries were defined by reference to a personal relationship, and it lacked the quality of being a public trust. A gift for the education of descendants of named individuals must be regarded as a family trust and not as one for the benefit of a section of the community.

Decision of Cohen J. [1944] Ch. 378, reversed.

The statement in Tudor on Charities, 5th ed., pp. 30, 31, that "bequests for the education of the donor's descendants and "kinsmen at a school or college" were valid, was not supported by the authorities there cited.

In re Rayner (1920) 122 L. T. 577, disapproved. *In re McEnery* [1941] I. R. 323, approved.

The authorities derived from *Isaac* v. *De Friez* (1754) 2 Amb. 595, *White* v. *White* (1802) 7 Ves. 423 and *Attorney-General* v. *Price* (1810) 17 Ves. 571, laying it down that trusts for the benefit of poor relatives of the donor are valid charitable trusts must at this date be regarded as good law, but they are anomalous, and not to be extended to apply to a different class of case.

APPEAL from Cohen J. (1).

By her will, dated May 29, 1906, a testatrix provided, inter alia: "…. the money [describing it] is to be …. "invested …. under a trust for ever …. for the educa"tion of Compton and Powell and Montague children but "Compton and Powell are to have the preference as scholar"ships for the time thought best by the trustees not over the age "of twenty-six years. It is not to be used as a pension or in"come for any one and is to be held as scholarships at the

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"pleasure of the trustees. It is to be used to fit the children to "be servants of God serving the nation, not as students for "research of any kind . . . . Compton children are the "lawful descendants of H. C. Compton . . . . Powell chidrn "(sic) are the lawful descendants of Weyland Powell . . . . "and Montague children the lawful descendants of William "Earl of Sandwich father of the Earl of Sandwich hereinbefore "mentioned . . . ." The testatrix died on November 14, 1941. A summons, dated November 12, 1943, was taken out by the surviving personal representatives of the testatrix asking, inter alia, whether the trust was a valid charitable bequest or was void for perpetuity or uncertainty or was valid for any and what period. At the date of the summons there were living ten Compton, six Powell and twelve Montague children, all less than twenty-six years old.

Cohen J. held that the trust was a valid charitable bequest. The next of kin appealed.

Gray K.C. and *Burnett-Hall* for the next of kin. Cohen J. held that he was bound by authority to hold that this was a good charitable trust. It is submitted that the cases on which he relied are distinguishable, or, if they are not, that this court should overrule them. If this is a good educational trust, it is difficult to know what would not be. Such a trust must be for the benefit of some substantial portion of the public, which these three families are not. The only cases which come near to it, are all cases for the relief of poverty. They are distinguishable, because the relief of even a small number of persons benefits the community by taking the burden of maintenance from it. But education of a small number of individuals benefits them and them only. (See *Verge* v. *Somerville* (1); *In re Foveaux* (2); *Goodman* v. *Mayor of Saltash* (3).) If there is a general intention to relieve poverty, a preference given to the testator's kindred will not destroy the charity. This is easier to show in the case of poverty, than of education, but even so, a gift purely for the relief of poor relations is not a good charitable gift. [He referred to *In re McEnery* (4); *In re Rayner* (5); *Laverty* v. *Laverty* (6); *Attorney-General* v. *Sidney Sussex College* (7); *Attorney-General* v. *Northumberland*

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(1) [1924] A. C. 496.
(2) [1895] 2 Ch. 501, 504.
(3) (1882) 7 App. Cas. 633.
(4) [1941] I. R. 323.
(5) (1920) 122 L. T. 577.
(6) [1907] 1 I. R. 9.
(7) (1869) L. R. 4 Ch. 722.

(*Duke*) (1); *White* v. *White* (2); *Attorney-General* v. *Price* (3); *In re Drummond* (4); *Jones* v. *Williams* (5); *Pemsel* v. *Inland Revenue Commissioners* (6); and to Tudor on Charities, 5th ed., pp. 6, 7, 11, 12, 14.]

Harman K.C. and *H. E. Salt* for one of the Montague children. To allow this appeal would cast doubt on all the cases of relief of poverty, including a class marked out by consanguinity to the testator. They begin as far back as 1754 with the pronouncement of Lord Hardwicke in *Isaac* v. *De Friez* (7), and continue through *Attorney-General* v. *Price* (8); *Gillam* v. *Taylor* (9); *Attorney-General* v. *Northumberland* (*Duke*) (10), where Sir George Jessel M.R. cites all the cases with approval, though he does point out that Wickens V.C. made a slip in *Gillam* v. *Taylor* (9). It is clear from the wording of the bequest that the testator's intention was to benefit the nation by educating the children of the three families to the service of God and of their country, and not to make them merely solitary students. Whether the object be relief of poverty or education, so long as there is a defined class, its number need not be large. *Attorney-General* v. *Sidney Sussex College* (11) is very much in point in the present case. A gift for the benefit educationally of a section of the community is a good charity, and the three families may come to form a large class: see Tudor on Charities, 5th ed., p. 12, and *In re Rayner* (12).

Sir David Maxwell Fyfe S.-G. and *Danckwerts* for the Attorney-General. A bequest from the relief of poor relatives is a valid charitable bequest: see in addition to cases already cited *Browne* v. *Whalley* (13). Further, it is difficult to see any distinction between poverty cases and educational cases. The fourth category laid down by Lord Macnaghten in *Pemsel* v. *Inland Revenue Commissioners* (14) of gifts for the benefit of the public was not intended to be more than a sweeping up of the earlier categories, and for an educational gift to be a good charity it need not be for the benefit of the public. The only question is whether the beneficiaries are sufficiently extensive to take them out of the description of specific individuals, and to cause the gift to be to a section of the

(1) (1877) 7 Ch. D. 745.
(2) (1802) 7 Ves. 423.
(3) (1810) 17 Ves. 371.
(4) [1914] 2 Ch. 90.
(5) (1767) 2 Amb. 651.
(6) [1891] A. C. 531, 583.
(7) (1754) 2 Amb. 595.
(8) 17 Ves. 371.
(9) (1870) L. R. 16 Eq. 581.
(10) 7 Ch. D. 745, 750–2.
(11) L. R. 4 Ch. 722.
(12) 122 L. T. 577.
(13) [1866] W. N. 386.
(14) [1891] A. C. 531, 583.

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community, with a less wide meaning than in the fourth category: see *Griffith Flood's* case (1).

[Lord Greene M.R. referred to *Spencer* v. *All Souls College* (2).] That case does not really assist. In the case of a bequest for scholarships the assistance of a scholastic institution is contemplated, just as in *Griffith Flood's* case (1). The same principle applies whether the subject matter of the trust is the granting of scholarships or the payment of school fees.

Armitage for the trustees.

Gray K.C. replied and referred to *Cocks* v. *Manners* (3) as showing that a trust for the benefit of individuals was not a good charity.

Cur. adv. vult.

Dec. 20, 1944. Lord Greene M.R. read the following judgment: The question which falls for decision in this appeal is whether a certain bequest for educational purposes contained in the will of the testatrix is a good charitable gift. That question Cohen J. answered in the affirmative. He felt himself constrained so to do by reason of certain authorities which for convenience I will refer to as "the poor relations" cases. If he had not felt himself bound by analogy to have regard to those authorities he would have decided otherwise. We are invited by counsel for the next of kin to say that the "poor relations" cases were wrongly decided: alternatively that they do not cover the present case, and that the principle (whatever it may have been) on which they were based ought not to be extended by analogy to bequests for educational purposes, such as that with which we have to deal.

There is now no dispute as to the subject matter of this bequest. The only question is as to the validity of the trusts declared by the testatrix. There are a number of points to be noticed in the language of the bequest which I will set out seriatim. (1.) The trust is to last for ever, and accordingly is obnoxious to the rule against perpetuities unless it is a valid charitable trust; (2.) the persons to benefit are the descendants, rich and poor, of three named individuals; (3.) the pecuniary benefits are to take the form of "scholarships," a word which is not, I think, used in any technical sense but merely means that yearly sums are to be provided for the education of the beneficiaries, for so long as the trustees may think proper in each case. The trusts could, I think, be properly performed by paying, in whole or in part, for education at a school or at a university, or even for a private tutor; (4.) the direction that the money is not to be used as a pension or income appears to me to mean no more than that a selected beneficiary is not to be entitled to receive income as of right: the words must be read in the light of the direction that payments are to be held as scholarships at the pleasure of the trustees. In other words, the money is to be used, and used only, for defraying the costs of education, and it can be withheld whenever the trustees think fit; (5.) the type of education for which the money is to be used is defined both positively and negatively. It is not to be used to fit the beneficiaries to be students for any kind of research, words which I think would exclude a grant to enable a beneficiary to conduct research, for example, on some point of history or science. On the positive side, the money is to be used " to fit the children to be servants of God serving the " nation." These words are of very wide import and would cover many kinds of education. There is no need to consider how far the direction would extend but it would, in my opinion, clearly cover what is generally regarded as the ordinary public school education. The words are most apt to describe the ideals of such an education as that for which Dr. Arnold stood, and which, at any rate since his time, have always been regarded as the dominant purpose of a public school education. This particular direction is of importance, since a separate argument was based on it.

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(1) (1616) Hob. 136.

(2) (1762) Wilmot's Notes of opinions, 163.

(3) (1871) L. R. 12 Eq. 574.

The questions for decision may be thus stated. (1.) Is a trust for the education of the descendants in perpetuity of three named individuals, irrespective of their means, a valid charitable trust? (2.) If not, is the present trust a valid charitable trust, by reason of the fact that the kind of education which is required is such as " to fit the children to be servants " of God serving the nation?" These questions are clearly of general importance. The second question is not merely important for the purposes of this particular will, since, if the first question be answered in the negative and the second in the affirmative, it will be a simple matter to convert a gift which is not charitable into a good charitable gift. There is one matter of fact to which some importance was attached in the course of the argument. The number of the descendants of the three named persons who were under the age of twenty-six at the death of the testatrix is stated to have been twenty-eight. This was, of course, a mere accident. They might have been three or they might have been a hundred. In the future the numbers may be large or small. Families not infrequently die out, and it may well be that at some future date there may be only one potential beneficiary in existence. It is not to be assumed that the number of potential beneficiaries will necessarily always be substantial. In any event, mere numbers cannot raise a family or private benefaction into the class of charitable gifts. No doubt in deciding whether a gift, which in its nature is not a mere private or family benefaction, is or is not for the benefit of a section of the community, so as to make it a good charitable gift, the question of the number of potential beneficiaries is a relevant one. But if a gift is in its nature a private or family benefaction it cannot be regarded as a charitable gift merely because the number is, or may at some future date become, considerable. The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in Tudor on Charities, 5th ed., p. 11: "In the first place it may be laid down as a universal rule "that the law recognizes no purpose as charitable unless it is "of a public character. That is to say, a purpose must, in "order to be charitable, be directed to the benefit of the "community or a section of the community." Authority for this proposition is to be found in numerous cases of which the following are examples: per Lord Cairns in *Goodman* v. *Mayor of Saltash* (1): "Such a condition would create that which in "the very wide language of our courts is called a charitable, "that is to say a public, trust or interest, for the benefit of the "free inhabitants of ancient tenements. A trust of that kind "would not in any way infringe the law or rule against per"petuities, because we know very well that where you have a "trust which, if it were for the benefit of private individuals or "a fluctuating body of private individuals, would be void on "the ground of perpetuity, yet if it creates a charitable, that is "to say a public, interest, it will be free from any obnoxiousness "to the rule with regard to perpetuities"; per Lord Macnaghten in *Pemsel's* case (2): "The Court of Chancery has always "regarded with peculiar favour those trusts of a public nature "which, according to the doctrine of the court derived from "the piety of early times, are considered to be charitable";

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(1) 7 App. Cas. 633, 650.

(2) [1891] A. C. 531, 580.

per Chitty J. in *In re Foveaux* (1): " To be a charity there " must be some public purpose—something tending to the " benefit of the community. The benefit in point of local area " need not extend to the public at large; a trust for the " benefit of the inhabitants of a particular district will suffice " ; and per Lord Wrenbury in delivering the judgment of the Privy Council in *Verge* v. *Somerville* (2): " To ascertain whether " a gift constitutes a valid charitable trust so as to escape being " void on the ground of perpetuity, a first inquiry must be " whether it is public—whether it is for the benefit of the " community or of an appreciably important class of the " community. The inhabitants of a parish or town, or any " particular class of such inhabitants, may, for instance, be the " objects of such a gift, but private individuals, or a fluctuating " body of private individuals, cannot."

The proposition is true of all charitable gifts and is not confined to the fourth class in Lord Macnaghten's well-known statement in *Pemsel's* case (3). It does not, of course, mean that every gift that tends to the public benefit is necessarily charitable. What it does mean is that no gift can be charitable in the legal sense unless it is of the necessary public character. When I come to deal with the " poor relations " cases it will be found that a hundred and fifty years ago the essential nature of this requirement was perhaps not as clearly appreciated as it is to-day.

No definition of what is meant by a section of the public has, so far as I am aware, been laid down, and I certainly do not propose to be the first to make the attempt to define it. In the case of many charitable gifts it is possible to identify the individuals who are to benefit, or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus, if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit, when they receive it, by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others, and that is something into which their status as

(1) [1895] 2 Ch. 501, 504.
(2) [1924] A. C. 496, 499.
(3) [1891] A. C. 583.

individuals does not enter. Persons claiming to belong to the class do so not because they are A.B., C.D. and E.F. but because they are poor inhabitants of the parish. If, in asserting their claim, it were necessary for them to establish the fact that they were the individuals A.B., C.D. and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are A.B., C.D. and E.F., but that they stand in some specified relationship to the individuals A.B., C.D. and E.F., such as that of children or employees. In such a case, too, a purely personal element enters into and is an essential part of the qualification, which is defined by reference to something, i.e., a personal relationship to individuals or an individual which is in its essence non-public. An example of this class of case is to be found in *In re Drummond* (1). There a testator bequeathed shares to his trustees on trust to pay the income to the directors of a company for the purpose of contributing to the holiday expenses of certain of its workpeople. The qualification therefore was that of a particular relationship (namely, that of an employee of the specified class) to a named person, i.e., the company. After dismissing the argument that the bequest ought to be construed as being one in relief of poverty, Eve J. dealt with the contention that the gift was " a gift for " general public purposes, to be applied for the benefit of a " particular section of the public." The following quotation from the judgment (2) brings out the point which I am endeavouring to make : " Mr. Austen-Cartmell argues that the " trust is really a trust for public purposes, the securing of a " holiday for a large body of the inhabitants of this particular " city, and the benefiting thereby of the general health of the " community ; that it only differs from the cases on which he " relied in that it fixes the qualification, not with reference to " any particular place of residence, or to the possession of any " particular franchise, but with reference to employment " in a particular business, and a particular department in that " business, and he contends that, if a public trust can be created " for the occupiers for the time being of a few small cottages in " a Hampshire village, a similar trust can certainly be created

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(1) [1914] 2 Ch. 90.

(2) Ibid. 96.

"for the large aggregation of persons constituting for the time "being the employees in some of these great industrial undertakings. I think the answer to that argument has been "supplied by Mr. Clayton in the course of his reply. This "is not a trust for general public purposes; it is a trust for "private individuals, a fluctuating body of private individuals "it is true, but still private individuals, and that being so it "is outside the line of authorities cited, and not being for public "purposes it is not charitable, but is void as infringing the "rule against perpetuities." The fact that in cases where a personal element forms an essential part of the qualification the numbers involved may be large does not appear to me to make any difference to the principle to be applied. Once that element is present numbers can make no difference. The gift is in such a case a personal gift. It may, of course, fail for uncertainty, but that is neither here nor there. As a personal gift it will be obnoxious to the rule against perpetuities; but it would not have been affected by the Statute of Mortmain. I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.

I will postpone for the moment the consideration of what I have called "the poor relations cases" and will now turn to the particular case of educational trusts. The references to such trusts in the preamble to the Statute of Elizabeth are as follows: "the maintenance of schools of learning, free schools "and scholars of universities; the education and preferment "of orphans." The references to scholars and orphans cannot be construed (at any rate nowadays) as referring to individuals. So to construe them would involve a departure from the principle that a trust in order to be charitable must be for the benefit of the community or a section of the community. It is no doubt true that the conception of an educational charity has been extended beyond the rather narrow classification in the preamble, but the authorities cited to show that a trust for the purpose of educating members of a specified family or specified families is a valid charitable trust do not, I think,

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establish that proposition. In Tudor on Charities, pp. 30, 31, I find this statement: "Bequests for the education of the "donor's descendants and kinsmen at a school or college" are valid charitable bequests. The authorities cited are three and I must examine them. The first is *Spencer* v. *All Souls College* (1). That was a case in which Wilmot J. (as he then was) sat as an assessor to the Archbishop of Canterbury, the Visitor of the College, upon appeals by certain "founder's kin" who claimed the right to be elected as fellows of the college against the decision of the warden and fellows who had elected other persons. The statutes of the founder, Archbishop Chicheley, laid it down that in all elections of fellows "Principaliter et ante omnes alios, illi qui sunt vel erunt de "Consanguinitate nostra & genere, si qui tales sint, ubicunque "fuerint oriundi, dum tamen sint reperti habiles & idonei, "secundum Conditiones superius & inferius recitatas, sine "aliquo Probationis tempore, in veros dicti Collegii Socios "ab initio eligantur & etiam admittantur: Quibus deficienti"bus," etc. In other words, preference was to be given to the founder's kin, a very common provision in the case of ancient foundations. The college contended that the relationship of the appellants to the founder was so remote as not to fall within the "consanguinitas et genus" prescribed by the founder. Wilmot J. in his opinion declined to accept the contention that a line ought to be drawn beyond which a candidate ought not to be regarded as founder's kin. The primary object of the founder in that case was to endow a college for the advancement of learning: the preference to his own kin was merely a method of giving effect to this intention. The validity of such dispositions had never been questioned from remote ages and was not questioned in the case. "Founder's kin" fellowships in the Universities of Oxford and Cambridge were for the most part abolished under the powers conferred by the Oxford University Act, 1854, and the Cambridge University Act, 1856, respectively. The *All Souls* case (1), in my opinion, affords no support to the proposition for which it is cited in Tudor.

The next authority relied on by Tudor is *Attorney-General* v. *Sidney Sussex College* (2). In that case a testator by his will, made in the year 1641, had devised certain lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, equally "for the only use, education in pietie and learninge of

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(1) Wilmot's Notes of Opinions, 163.

(2) L. R. 4 Ch. 722.

" foure of the descendants of my brothers and sisters, and three " of the descendants of the brother and sister of my first wife, " and three of the descendants of the brothers and sisters of my " second wife,.or, in default of such, to their next poor kindred." Each of the colleges had, ever since the death of the testator, required that a person claiming the benefit of these educational trusts should become a member of the college. Sidney Sussex College had always applied its share of the rents, in so far as they were not used for the education of persons referred to in the will, as part of the general funds of the college. Trinity College had in effect done the same thing down to the year 1826, since when its share of the rents had been used to provide exhibitions in the college. The proceedings were by way of information filed at the instance of a descendant of a brother of the testator's second wife, praying a declaration that the educational gift, and the gift to the poor kindred, were good charitable gifts. The case, on the relevant point, came first before Sir John Romilly M.R. (1), who was of opinion that the trust was a good charitable trust " in favour of certain poor " persons," and that subject to the rights of such persons, if any could be found, the property was given beneficially between the two colleges. The colleges, be it observed, had disregarded the possible claims of persons interested under the second branch of the trust, namely, that in favour of the poor relations, and the effect of the decision of the Master of the Rolls was that they were not entitled to do so. The actual declaration as reported (2) was to the effect that the lands were held in trust to educate the descendants mentioned in the will, and that in default of such persons the poor kindred of the testator's wives were absolutely entitled. On appeal to Lord Hatherley L.C., Sidney Sussex College claimed that in default of descendants willing to become members of the college the college was entitled to the whole of the rents; while Trinity College argued that the only trusts were for education. The principal point which arose appears to have related to the claim of the colleges to require claimants to become members of the college, a claim which had been in effect negatived by the declaration made by Sir John Romilly. The order made by the Lord Chancellor declared that the two colleges were entitled to the property subject to a trust to educate the descendants according to the course and usage of instruction in the colleges (thus confirming the construction put forward by the colleges) with such limitations over as appeared in the will in default of such descendants. Two points deserve mention. First, the gift was construed as a gift to the colleges upon trust to educate the descendants at the colleges. Secondly, no one appears to have questioned the validity of the trust: the only controversy was as to its true meaning. When the facts of this case are examined it is, I think, clear that it does not support the general proposition laid down in Tudor. It was a very special case, and resembles in some respects the "Founder's kin" cases.

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(1) 34 Beav. 654.

(2) L. R. 4 Ch. 726.

The third case is the Irish case of *In re Lavelle, Concannon* v. *Attorney-General* (1) a decision of O'Connor M.R. in Ireland. There the bequest was to an educational body (called a college) the income to go to the education of the relations of the testator in that college. In this respect the case resembled the *Sidney Sussex* case (2). The only passage in the judgment which deals with the question is where the Master of the Rolls says (3): "Gifts for the advancement of education are undoubtedly charitable and it has been decided that bequests "for the education of the donor's descendants and kinsmen are "charitable." He then refers to the *All Souls* case (4) and the *Sidney Sussex* case (2). It is clear that the Master of the Rolls was merely accepting the statement in Tudor, and I do not think that this case carries the matter any further. One further case was cited to us by counsel for the respondent, that of *In re Rayner* (5), a decision of Eve J. There were two bequests the validity of which was in question. That relevant for present purposes was a bequest to the governors of a commercial company of shares in the company with a direction to apply the income to the education of children of persons who, for five years and upwards, had been in the employment of the company. If the bequest should be held to be invalid the testatrix gave the shares to her executor absolutely. Eve J. did not have the advantage of any argument, since the only person interested in disputing the validity of the gift was the executor, who supported the view that it was a valid charitable gift. In a very short judgment Eve J. said that there was present an element which was wanting in his earlier decision, already quoted, *In re Drummond* (6) in that the object of the gift was to promote education. He distinguished *In re Drummond* (6) on the ground that in that case the gift was not restricted to the relief of poor people within the meaning of the statute, and said that in the case before him the gift was for an object within the statute and was accordingly a charitable gift. He was of opinion that the gift was " it is " true limited to a section of the public, but the section " intended to be benefited was sufficiently defined." I do not regard this as a satisfactory decision. There was no argument; the learned judge without giving any reasons treated the gift as one in favour of a section of the public; and in distinguishing *In re Drummond* (1) he apparently overlooked the fact that in that case the absence of the element of poverty was only one of the grounds of the decision. As I have already pointed out, the argument that the case fell within the fourth of Lord Macnaghten's classes was negatived on the ground that the trust in favour of the employees of the company was a trust not for public purposes but for private individuals. The decision, in my opinion, was wrong, so far as it dealt with the educational trust.

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(1) [1914] 1 I. R. 194.
(2) L. R. 4 Ch. 722.
(3) [1914] 1 I. R. 197.
(4) Wilmot's Notes of Opinions, 163.
(5) 122 L. T. 577.
(6) [1914] 2 Ch. 90.

I must now refer to two more Irish decisions. The first is *Laverty* v. *Laverty* (2). There the testator gave his estate on trust for the support and education of boys and men " of the " surname of O'Laverty or Laverty, O'Lafferty or Lafferty." It was held that this was not a charitable gift. Barton J. said (3): " In my opinion, a valid charitable trust might be " created for the advancement of education, with a preference " for persons of a particular surname, either by the endowment " of or gift to a school or college "—this I may interpose, would resemble the " founder's kin " provisions—" or by a gift, " as in the present case, to trustees, if sufficiently definite." He then proceeded to hold that the gift was not of that character since it might have been intended to work as a matter of private bounty—for example, by employing a governess or tutor for some wealthy young Laverty. So in the present case the income in certain events might be applied in paying for a tutor for the Earl of Sandwich of the day, irrespective of his means. The other case, by the reasoning in which Cohen J. was clearly much impressed, is *In re McEnery* (4). There the testator made a bequest " for enabling " the sons and daughters and male descendants " of his brothers " to obtain professions, each suitable student to receive 100*l*. " yearly, for a reasonable time." Gavan Duffy J. began by

(1) [1914] 2 Ch. 90.
(2) [1907] 1 I. R. 9.
(3) Ibid. 13.
(4) [1941] I. R. 323.

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Lord Greene M.R.

pointing out the public character of a legal charity. "Courts "of Equity" he said, "have been consistently insistent on the "public character of a legal charity, importing a benefit to the "community or a section of the community." He then pointed out the difference between an endowment to maintain two scholars in Oxford and Cambridge and a trust for the personal educational benefit of the heir for the time being of a testator for ever: and he went on to say that there was nothing public about the latter purpose, and that the prospective heirs would not constitute a section of the community for whom a charitable trust could be established. He explained the *All Souls* case (1), the *Sidney Sussex* case (2) and *In re Lavelle* (3) as showing no more than that the founder of a charity or a benefactor may lawfully associate his descendants with his bequest to a charitable institution, and thus enable them to participate in his liberality. He then expressed the opinion that the trust before him was too narrow to be charitable. The motive, he said, may have been charitable, but the intention was to benefit specific individuals. If I may respectfully say so, this reasoning appears to me to be unassailable. Even if my view that the necessity of founding a claim upon the fact of kinship to an individual precludes the possibility of regarding a gift as charitable is too widely stated, I am of opinion that a gift for the education of descendants of named persons must be regarded as a family trust and not as one for the benefit of a section of the community, on any fair view of what that phrase may mean. Such a purpose appears to me to be no more a public educational purpose than the purpose of enabling a body of individuals to perfect themselves by prayer and meditation is a public religious purpose (see *Cocks* v. *Manners* (4)). Moreover, as Morton L.J. has reminded me, if such a trust is held to be charitable a testator will be able to provide in perpetuity for the education of his kinsmen in a way which will avoid the payment of income tax on the trust income.

But it is suggested that even if this be true, the present case presents a feature which is sufficient to make the gift a charitable one, namely, the direction as to the kind of education to be provided. It is said that it is beneficial to the community to have individuals so educated as to become God-fearing men and women and good citizens, and that a trust designed to

(1) Wilmot's Notes of Opinions, 163.

(2) L. R. 4 Ch. 722.

(3) [1914] 1 I. R. 194.

(4) L. R. 12 Eq. 574.

increase the number of persons of that description, even if they are confined to the narrow limits of a particular family or particular families, must for that reason be regarded as charitable. I venture to suggest that in this sense education by itself, without reference to any particular kind of education, is in the same way beneficial to the community, and that it is to the benefit of the community to have as many educated persons among its members as possible. Again, there are many particular kinds of education which may be considered specially beneficial—for example, it is clearly to the advantage of the community to have a large number of trained scientists, and from the argument it would appear to follow that a trust to give a scientific education to the descendants of a testator's three brothers would be a valid charitable trust. The argument, moreover, would appear to lead to the conclusion that a gift to educate, for example, a number of named nephews and nieces of a testator, so as " to fit them to be servants of God serving " the nation " would be charitable by reason of that direction. In such a case there would, of course, be no question of perpetuity, so that it would not be necessary to regard the trust as charitable in order to support it in that regard. But if the property devised or bequeathed consisted of real estate or impure personality, the effect of holding the gift to be charitable would, in past days, have been to invalidate it under the Statute of Mortmain, and I cannot think that any court would have so regarded the gift as to produce that result. Moreover, if the argument is right, it would mean that a testator could provide for the education of his family in perpetuity, thus, incidentally, obtaining relief from income tax, merely by adding to his bequest a direction that the kind of education to be provided is to be such as will be calculated to make them God-fearing men and public-spirited subjects of the King—a direction which, as I have already pointed out, would cover the ordinary public school education.

I must now turn to the " poor relations " cases on the analogy of which Cohen J. felt himself constrained, against his own view, to decide against the next of kin. The authorities relied on by the respondent are as follows. In *Isaac* v. *De Friez* (1) the gifts were (1.) a gift of two annuities to the poorest relations of the testator and of his wife ; (2.) a gift of income to one poor relation of the testator " for a portion in the way of marriage " and putting him or her out in the world," and (3.) a similar gift of income to one poor relation of his wife. These gifts were upheld as good charitable gifts, but no reasons for the decision appear in the report. This case was followed in *Attorney-General* v. *Price* (1), where the gift was in favour of the testator's "poor kinsmen and kinswomen and their offspring and issue "which shall dwell in the county of Brecon." Sir William Grant M.R., followed *Isaac* v. *De Friez* (2) saying: "This "seems to be just as much in the nature of a charitable bequest "as that. It is to have perpetual continuance, in favour of a "particular description of poor; and is not like an immediate "bequest of a sum to be distributed among poor relations." In an earlier case *White* v. *White* (3), Sir William Grant had supported as charitable a gift by a testatrix for the purpose of putting out "our poor relations" as apprentices. By a codicil this gift was confined to two families. Sir William Grant appears to have thought that the case was similar to an earlier case of his own where "a great number of Jews were the "objects"; such a gift would no doubt be regarded to-day as satisfying the well-established rule that a good charitable gift must be for the benefit of the public or a section of the public, a test which Sir William Grant does not appear to have taken into consideration in *White* v. *White* (3) or in *Attorney-General* v. *Price* (1). *Bernal* v. *Bernal* (4), was a case in which the only matter decided arose on the construction of a will providing for poor relations who were in fact (as the will was construed) the male descendants of certain named relatives of the testator. It appears from the petition (5) that the gift was established as a charity under a decree of December 9, 1728. What the reasons were for the decision in that behalf does not appear, and when the question of construction was raised in 1838 before Lord Cottenham L.C., there was no issue as to the charitable nature of the bequest. In *Browne* v. *Whalley* (6), where the gift was for the relations of the testator "who might "happen to be in want or fall to decay," the charity had similarly been established by a decree of the year 1763. In *Gillam* v. *Taylor* (7), the gift was in favour of such of the lineal descendants of the testator's maternal uncle as they might severally need. This was held to be a good charitable gift on the authority of *Isaac* v. *De Friez* (2) and *Attorney-General* v.

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(1) 2 Amb. 595.

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(1) 17 Ves. 371.
(2) 2 Amb. 595.
(3) 7 Ves. 423.
(4) (1838) 3 Myl. & Cr. 559.
(5) Ibid. 565.
(6) [1866] W. N. 686.
(7) L. R. 16 Eq. 581.

Price (1). In *Attorney-General* v. *Duke of Northumberland* (2), the will, as construed by Sir George Jessel M.R., was in favour of poor persons generally with a preference for poor persons who were kindred of the testator, and in that respect the case was similar to the "founder's kin" cases. But Sir George Jessel in his judgment referred to *Isaac* v. *De Friez* (3) and *Attorney-General* v. *Price* (1) and did not cast doubt on the correctness of those decisions. From this review of the authorities it will be seen that they are really all derived from *Isaac* v. *De Friez* (3) and *Attorney-General* v. *Price* (1). We are invited to overrule them. I agree that they are far from satisfactory, and the original decisions were given at a time when the public character of a charitable gift had not been as clearly laid down as it has been in more modern authorities. If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently on the ground that their purpose was a private family purpose, lacking the necessary public character, but it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations on the faith that they were charitable, and many testators have no doubt been guided by these decisions. The cases must at this date be regarded as good law, although they are, perhaps, anomalous.

In these circumstances the question arises whether we ought to extend the analogy of these decisions, so as to cover a trust of the kind now in controversy. Taking the view which I have already expressed, I do not think that we are bound, or ought, to do so. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded: whereas in the case of an educational trust, where there is no poverty qualification, the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the "poor relations" cases as

(1) 17 Ves. 371.
(2) 7 Ch. D. 745.
(3) 2 Amb. 591.

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anomalous, and I prefer to let them remain as such rather than to extend the anomaly to a different class of case. I would allow the appeal.

Finlay L.J. I agree.

Morton L.J. I agree.

Appeal allowed.

Solicitors: *Farrer & Co.; Royds, Rawstorne & Co.; Treasury Solicitor; Lovell, Son and Pitfield, for Nantes, Maunsell & Howard, Bridport.*

H. C. G.

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Nov. 16, 17, 21; *Dec.* 7.

In re COCHRANE.

COCHRANE *v.* TURNER.

Revenue—Estate duty—Marriage settlement—Income of trust fund payable to wife for life for household expenses—Income to husband for life, if surviving—Capital to children on death of survivor—Income not used for household expenses during joint lives—Death of husband—Liability to estate duty—Finance Act, 1894 (57 & 58 *Vict., c.* 30), *s.* 2, *sub-s.* 1 (*c*).

The trustees of a marriage settlement were directed to hold a fund settled by the husband (who predeceased his wife) on trust to pay the income to the wife for life, and after her death to the husband for life if he survived her, and after the death of the survivor on trust for all the children of the marriage. It was also provided that the income payable to the wife " shall be expended " by her on current household expenses or management." During the fifty-seven years of the married life of the parties, the wife, with the acquiescence of her husband, spent the income of the fund entirely on herself:—

Held, that the husband's long acquiescence in the wife's use of the income merely marked the fact that there was no need for him to rely on it and did not suggest that he gave up his rights; that an interest for life in the income was reserved to him by the settlement; and that estate duty became payable on his death in respect of the trust fund.

Adjourned Summons.

By a marriage settlement, dated September 23, 1884, it was provided that the trustees of a fund settled by the husband, the income of which amounted to approximately 400*l.* a year, should hold the fund in trust to pay the income to the wife for life, and after her death to the husband for life if he survived her, and that, after the death of the survivor, they should hold the fund in trust for all the children of the marriage. It was also provided that the income payable to the wife during her life "shall be expended by her on current household expenses or management." The husband died on November 22, 1941, and the wife died six months later. During the fifty-seven years of their married life the wife had no separate fortune and no source of income other than the settlement, and the husband, who was a wealthy man, maintained a large establishment, spending approximately 3,000*l.* a year on household and outdoor expenses. Throughout the whole period the wife, with her husband's acquiescence, spent the settled income entirely on herself. The Crown claimed that the settlement conferred on the husband an interest in the trust fund for his life, and that estate duty became payable on his death under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894 (1). An originating summons was taken out by the trustees of the settlement for the determination of that question.

H. A. Rose for the trustees. No estate duty became payable on the death of the husband in respect of the fund. The

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(1) By Finance Act, 1894, s. 2: "sub-s. 1 Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— (*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property . . . ."

By Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (as amended): "The real and personal or movable property to be included in an account shall be property of the following descriptions . . . . (*c*) Any property passing under any past or future settlement (including any trust whether expressed in writing or otherwise) made by any person dying after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof."

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provision in the settlement lacks all the essential qualities of a trust. (As to what constitutes a trust, see *In re West* (1).) This is a gift to the wife of a life interest, subject to the performance of a particular purpose, and, if that purpose, by agreement, was not carried out, the gift remains. If, however, the clause is sufficient to create a trust, the beneficiaries by their conduct might alter or revoke it and they have done so. The husband was the only person who could enforce the trust, and, in more than fifty years of married life, he never attempted to do so. He had only a reversionary life interest in the income of the trust fund if he survived his wife, but he did not survive her. The only life interest which took effect under the settlement was that of the wife. No estate duty was payable until her death, and then it was payable on her estate. (*Jackson* v. *Jackson* (2); and *In re Cross* (3) were also referred to.)

Harold Lightman, for a beneficiary, adopted the trustees' argument.

J. H. Stamp for the Attorney-General. The income payable to the wife was simply an allowance for household expenses, and, if it was not so spent, there was a resulting trust of a life interest in the settled estate to the settlor (the husband), under the Finance Act, 1894, s. 2, sub-s. 1 (*c*): see *Attorney-General* v. *Heywood* (4), a case under the Customs and Inland Revenue Act, 1881, under which duty was charged on property passing by deed whereby an interest for life was reserved to the settlor. The wife has no beneficial interest in the settled fund on which estate duty became payable on the husband's death: *Attorney-General* v. *Farrell* (5).

Rose replied.

Cur. adv. vult.

Dec. 7. UTHWATT J. read the following judgment. The Crown, arguing that as a matter of construction of the settlement the clause, with which we are concerned, gave the husband an interest in the trust fund for his life, claims that estate duty became payable in respect of the trust fund on the death of the husband under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

Before dealing with the construction of the settlement there

(1) [1900] 1 Ch. 84.

(2) (1804) 9 Ves. 591.

(3) (1882) 20 Ch. D. 109, 123.

(4) (1887) 19 Q. B. D. 326.

(5) [1931] 1 K. B. 81.

are two matters to which it is convenient to refer. As the law stood at the date of the marriage, the operation of the pre-nuptial contractual obligation between the intended spouses was by the fact of marriage suspended during the coverture. This was the case in equity as well as at law, even though the bargain was made in contemplation of coverture: *Cage* v. *Acton* (1), but the validity and effect of any charge or trust in favour of the intended husband affecting the property of the intended wife—a charge or trust which, if it arose in this case at all, arose on the making of the settlement—would not be touched by the circumstance that during coverture the contract in which the charge had its origin remained in abeyance. Marriage did not affect pre-nuptial dispositions of property made by the intended wife. The second matter is this. The married life in the present case lasted fifty-seven years. The wife had no separate fortune or any source of income other than the settlement. There is no evidence that during any part of the married life any part of the wife's settlement income was applied in discharge of any household expenses. In amount this income was of the order of 400*l.* by the year gross. The contribution that this income might make to household expenses was, indeed, meagre, for from the date of the marriage until practically the end of his life the husband, a wealthy man, maintained a comfortable establishment. The indoor servants numbered nine and there was as well an outdoor staff. The evidence shows that, since 1918 and, at any rate, till 1940, two accounts—an "A" account and a "B" account—were kept at the bank by the wife. The "A" account was fed by the husband normally at the rate of 3,000*l.* a year. That account was, save in one instance, used exclusively by the wife for meeting all current indoor household expenses, the outdoor expenses being discharged by the husband. To the "B" account there was paid the wife's settlement income and the moneys so paid were used by her exclusively for her personal purposes. In 1940 it so happened that the wife drew 970*l.* out of the "A" account and spent it on her private purposes. On the matter coming to light the 970*l.* was, with the consent of the husband and the wife, replaced out of moneys standing to the credit of the "B" account.

In these circumstances I was asked to draw the inference that, assuming the quoted provision had the result of creating a trust or charge in favour of the husband, the husband abandoned or

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(1) (1699) 1 Lord Raym. 515.

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released his interest. The facts may permit this inference, but I do not draw it. Direct evidence of intention to abandon or to release is absent. The provision in question is not common form and is, I apprehend, an unusual one, and, unlike most provisions in formal settlements, reflects the mind of the settlor and not the habits of his draftsman. It never was a real provision for the household expenses of the spouses and the penniless wife's personal needs had somehow to be met. The obvious inference is that the husband would pray in aid the benefits it gave him only in case circumstances should require. There is no evidence of any occasion arising that called for a reconsideration of the position created by the provision. The husband's long acquiescence in the wife's use of the income to my mind merely marks the fact that there was no need for the husband to rely on it, and does not suggest that the husband gave up his rights. His acquiescence contained no promise as to the future. The sword remained in its sheath. It was not thrown away. In these circumstances it is unnecessary to consider s. 59 of the Finance (1909–10) Act, 1910, as amended by s. 43 of the Finance Act, 1940.

I turn now to the construction of the provision. In form it is, not merely an agreement, but a declaration, with the result, in my opinion, that a disposition of the subject-matter to which the clause relates—the wife's income—as well as a contract in relation to that subject-matter might well be covered. The next point is as to the parties to the bargain involved in that agreement and declaration. It is obviously a bargain by the wife, and, in my opinion, it is a bargain by the wife with the husband alone. The provision is, indeed, patient of the construction that it is a bargain with the trustees as well as the husband, but the subject-matter to which the bargain is expressed—internal domestic affairs—negatives any intention that the bargain was to be enforceable by the trustees. Thirdly, in my view, the current household expenses referred to are the current household expenses of the matrimonial home, that is to say, expenses of the kind specified arising during the joint lives of the parties, whether incurred by the husband or by the wife. It is true that the income applicable to the purposes specified is not confined to income arising during joint lives, but sufficient effect is given to the terms of the provision by treating income arising to the wife after the husband's death as applicable to expenses incurred during joint lives. The last question of construction of the settlement is whether a trust of the income or a charge on the income is created which enures for the benefit of the husband. It was argued on behalf of the subject that no trust or charge on the wife's income in favour of the husband was intended or created. In my view, it was. Ascertained property was made applicable for a specific purpose in relief of the husband. That is sufficient to create a trust or charge in favour of the husband.

The husband's interest under the settlement can now be exactly stated. He had a right to require that any current household expenses incurred by him during the joint lives should be met out of the settlement income (the wife having the right also to apply the same income towards household expenses incurred by her), and this right extended to and gave him an interest in the whole income: cf. *Attorney-General* v. *Heywood* (1); *Attorney-General* v. *Farrell* (2). Secondly, if he survived the wife, he was entitled to the whole income for the rest of his life. The husband's interest under the settlement can only be ascertained by taking the two rights together. That interest was, as regards its duration, a life interest for the life of the husband. In one way or another the interest attached to the whole settlement income during the husband's life. The possible change in its character during the husband's life is, in my view, immaterial. There was, therefore, by the settlement, reserved to the husband an interest for life within the meaning of the statutory provision. In my opinion, therefore, estate duty became payable on the death of the husband in respect of the trust fund.

Solicitors: *Bentleys, Stokes & Lowless, for Belk & Smith, Middlesborough; Solicitor of Inland Revenue.*

(1) 19 Q. B. D. 326. (2) [1931] 1 K. B. 81.

J. L. D.

MARLBOROUGH (DUKE) *v.* ATTORNEY-GENERAL (No. 2).

C. A.
1944
Nov. 8, 9, 10; *Dec.* 11.
Lord Greene M.R., Finlay and Morton L.JJ.

Revenue—Estate duty and succession duty—Settlement by Act of Parliament—Commutation of pension—Investment of proceeds in freeholds on trust for sale—Conversion—"Lands or chattels"—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 5, *sub-s.* 5.

By 5 Anne, c. 4, an annuity or pension of 5,000*l.* was settled by Parliament on John, first Duke of M., in such manner that it should always go and be held with the dukedom, and should be inalienable by the holder for the time being. The pension was commuted under the Consolidated Fund (Permanent Charges Redemption) Act, 1873, and the fund was brought into court in accordance with the Act. The court from time to time authorized the investment of part of the fund in the purchase of freeholds in the City of London, but, regarding these as temporary investments, ordered that they should be conveyed to trustees on trust for sale, but no such sale was to take place without the consent in writing of the Duke of M. for the time being (unless he were an infant or incapable of consenting) or an order of the court. A question having arisen, on the death of the ninth Duke of M. in 1934, as to the incidence of succession duty and estate duty on these freeholds, according as they were or were not " lands or chattels " within the meaning of s. 5, sub-s. 5, of the Finance Act, 1894 :—

Held, that the trust for sale effected an immediate conversion, notwithstanding the necessity for consent, and the freeholds were therefore not " lands " ; neither were they " chattels " within the meaning of the sub-section, which therefore did not apply.

In re Exmouth's Annuity [1925] Ch. 280 approved and followed.

APPEAL from Vaisey J.

The second question arising on an Originating Summons taken out by the tenth Duke of Marlborough under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, was : " Whether in relation to certain freehold properties " (' the London freeholds ') representing together with certain " other investments the redemption moneys of an annuity " granted originally by 5 Anne, c. 4, to John Duke of " Marlborough (' the pension fund ') estate duty falls to be " paid on the value of the pension fund, or, pursuant to s. 5, " sub-s. 5 of the Finance Act, 1894 (1) on the value of the " interest in the pension fund of the plaintiff to be valued in " like manner as for the purpose of succession duty." A question in similar terms was asked in relation to the investments representing capital moneys arising, through the exercise of the powers conferred by the Settled Land Acts, from the Blenheim Parliamentary estates granted originally by 5 Anne, c. 3. [For the first question, see *Marlborough (Duke)* v. *Attorney-General (No. 1)* (ante p. 78).]

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(1) By the Finance Act, 1894, s. 5, sub-s. 5 : " Where any lands " or chattels are so settled, " whether by Act of Parliament " or royal grant, that no one of " the persons successively in " possession thereof is capable of " alienating the same, whether his " interest is in law a tenancy for " life or a tenancy in tail, the " provisions of this Act with " respect to settled property shall " not apply, and the property " passing on the death of any " person in possession of the lands " and chattels shall be the interest " of his successor in the lands and " chattels, and such interest shall " be valued for the purpose of " estate duty in like manner as for " the purpose of succession duty."

The following statement of facts is taken in substance, but with some abridgement, from the judgment of Vaisey, J.

By Letters Patent under the Great Seal in the fourth year of Queen Anne the Honour and Manor of Woodstock and other hereditaments (" the Blenheim Parliamentary estates ") were granted unto and to the use of John, first Duke of Marlborough, his heirs and assigns for ever. In the following year the Act 5 Anne, c. 3, intituled " An Act for settling the Honours and " Dignities of John Duke of Marlborough upon his posterity " and annexing the Honour and Manor of Woodstock and " House of Blenheim to go along with the said Honours," settled the Blenheim Parliamentary estates to follow the devolution of the title in such manner that neither he . . . . nor any other person to whom the premises should come or descend should be entitled (in effect) to take any step to bar or put an end to those limitations by any means whatsoever. Immediately after the passing of that Act, the next chapter, 5 Anne, c. 4, intituled " An Act for settling upon John Duke of " Marlborough and his posterity a pension of 5,000*l.* per annum " for the more honourable support of their dignities in like " manner as his honours and dignities and the Honour and " Manor of Woodstock and House of Blenheim are already " limited and settled," settled an annuity or pension of 5,000*l.* (" the pension ") charged on the revenues of the Post Office, on the first Duke for life and then on the Duchess for life, and thereafter in the same manner as the title was limited by the first Act. Both the Blenheim Parliamentary estates and the pension were annexed to the title and made inalienable.

By 19 & 20 Vict., c. 59, the pension (reduced from 5,000*l.* to 4,000*l.* per annum) was charged upon the Consolidated Fund instead of on the revenues of the Post Office. By the Consolidated Fund (Permanent Charges Redemption) Act, 1873 (" the Act of 1873 ") power was given to redeem any annuity as defined by the Act (which included the pension) subject, in the case of a limited owner, to the redemption money being paid into court and applied by or under the direction of the court for the benefit of the person entitled thereto. In about 1884 the pension was redeemed under the Act of 1873, and the redemption moneys were paid into court and invested in

34,419*l*. 19*s*. 1*d*. Bank of England stock. In 1892 the ninth Duke succeeded to the dukedom and to an interest for life in both the Blenheim Parliamentary estates and the pension. He died on June 30, 1934.

Under an order of Chitty J. in 1894, part of the redemption moneys was invested from time in the purchase of certain freeholds in the City of London ("the London freeholds"), and on April 11, 1905, owing to certain technical difficulties arising from the terms of the Act 5 Anne, c. 4, a deed of settlement was entered into under an order of the court, whereby it was recited that all the London freeholds ought to be deemed temporary investments only, and they were conveyed to trustees on trust for sale, with power to retain unsold any hereditaments. No sale was to be effected (except under an order of the court) without the consent in writing of the Duke of Marlborough for the time being, if of full age and capable of giving it, otherwise no consent should be necessary. Every new trustee was to be approved of as such by the Treasury, which was also to have notice of every application to the court relating to the settlement, the Treasury being interested presumably as the ultimate reversioner to the Parliamentary estates and the pension fund in the event of the extinction of the dukedom. (The terms of this deed are more fully referred to in the judgment.) Portions of the Parliamentary estates were sold by the Duke under his statutory powers, and the proceeds of sale were at his death represented by certain investments and a sum of cash.

Vaisey J. held that the London freeholds, being held on trust for sale, were not "lands or chattels" within s. 5, sub-s. 5, of the Finance Act, 1894, nor could they be said to be settled "by" an Act or Acts of Parliament, but only pursuant to, or under the authority of, an Act or Acts. He accordingly held that s. 5, sub-s. 5, did not apply to them. But, by a parity of reasoning, in the converse case the investments and cash representing proceeds of sale of portions of the Parliamentary estates remained "lands," and equally with the unsold portions were entitled to the benefit of the sub-section. The Duke appealed, and the Crown cross-appealed.

Harman K.C. and *J. A. Wolfe* for the Duke. The question is whether these lands are "lands" within the meaning of s. 5, sub-s. 5, of the Act of 1894, and if not, whether they are "chattels" within that sub-section, and, further, whether they were settled by an Act of Parliament. We ask this court to say that the decision of Eve J. in *In re Exmouth's Annuity* (1) was wrong. If it is right, all these pensions will disappear in a generation or two. The word "chattels" extends to all personal property. The method of payment of estate duty was varied by the Finance Act, 1922, s. 44, by enabling the duty to be charged on, and to be raised and paid out of, the corpus of the "land or chattels." That would be a remarkable provision if the word "chattels" were restricted to meaning such things as furniture. The meaning of "goods and chattels" is discussed in Stroud's Judicial Dictionary, 2nd ed., p. 823. No case is known where such things as furniture have been settled by Parliament. For authorities on the meaning of "chattels" see *Ryall* v. *Rowles* (2); *Colonial Bank* v. *Whinney* (3). On the true construction of "chattels" investments are included.

Conversion is a question of the true construction of the document, and if the court comes to the conclusion that it was the intent that there should be a sale sometime, and that the power of postponement or consent is merely for convenience, the trust for sale works an equitable conversion. On the other side of the line are cases where there is an absolute power to prevent a sale by withholding consent, which may continue indefinitely. So here it is contemplated that there will always be a Duke of Marlborough, and that his consent will be necessary. He may at times be an infant or of unsound mind, but that is not a thing which is bound to happen. On this deed there is no imperative trust for sale. [They referred to *Sykes* v. *Sheard* (4), and *In re Goswell's Trusts* (5).] It is said that, assuming these lands to be "lands or chattels" within the section, they are not lands or chattels settled by royal grant or Act of Parliament. They are as much settled by Act of Parliament as the original pension, the charge for which was transferred to the consolidated fund, and then commuted under the Act of 1873. The redemption fund, which is money provided by Parliament, is to be applied by the Court of Chancery for the benefit of the person entitled thereto. It is still settled by Act of Parliament, the Act being the Act of 1873. Unless created by Act of Parliament, the settlement is bad as creating a perpetuity.

(1) [1925] Ch. 280.
(2) (1750) 1 Ves. Sen. 349.
(3) (1885) 30 Ch. D. 261, 285; in H. L. 11 App. Cas. 426.
(4) (1863) 33 Beav. 114.
(5) [1915] 2 Ch. 106.

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MARLBOROUGH (DUKE) v. ATTORNEY-GENERAL (No. 2).

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown. We say that there are three categories of property—lands, personalty other than chattels, and chattels, and they are dealt with differently for the purpose of death duties. Settled personalty, not being within s. 5, sub-s. 5, would pay duty on the full capital value, but would pay it once only, and would then be franked for the whole period under the law as it then stood. In the case of land, duty would be payable on the successive life interests, and in the long run more would be paid. In considering whether property is " land or chattels " within s. 5, sub-s. 5, it is necessary to look at the context of the statute, where we find in other sub-sections the phrases " All " property, real or personal, settled or not settled," " settled " property " and the like. It is inconceivable that if Parliament had intended sub-s. 5 to apply to all settled property it would not have used those words. [They referred to *Braybrooke* v. *Attorney-General* (1).] For the meaning of " chattels " in Scotland, see Bell's Principles of the Law of Scotland, 8th ed., para. 1285.

The question whether these lands are subject to a trust for sale depends, subject to the authorities, on the construction of the settlement and its recitals, and of the order under which the settlement was made. Where it is possible to construe a settlement made under an order in such a way as to give effect to it, it is right so to construe it. These were intended to be temporary investments and were made subject to a trust for sale for that reason. Settlement " by " and " under " an Act are different things. This freehold land was not settled " by " an Act. The Act of Anne settled a pension; the Act of 1873 gave a power of commutation, but did not itself commute the pension, and when the power was exercised " under " the Act of 1873, it was the court, not the Act, which authorized the purchase of the freeholds.

Harman K.C. in reply. A trust for sale does not always work a conversion: to do so there must be an unfettered discretion in the trustees. He referred to *In re Ffennell's Settlement* (2), and *Attorney-General* v. *Dodd* (3). " Chattels " should be given the meaning it has always had in statutes, and include choses in action.

Cur. adv. vult.

Dec. 11, 1944. The judgment of the court was read by

(1) (1861) 9 H. L. C. 150, 165.

(2) [1918] 1 Ch. 91, 98.

(3) [1894] 2 Q. B. 150.

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MORTON L.J. who briefly summarized the history of the Marlborough pension, and continued: The facts in regard to the purchase of the London freeholds, and the events leading up to the settlement of April 11, 1905, are very fully and clearly set out in the judgment of Vaisey J., and we gratefully adopt his statement of these events.

The ninth Duke died on June 30, 1934. The present Duke, who is the plaintiff in these proceedings, contended before Vaisey J. and before us that the London freeholds were " lands " or chattels " to which the provisions of s. 5, sub-s. 5, of the Finance Act, 1894 apply. Vaisey J. held that the London freeholds were neither " lands " nor " chattels " within the meaning of that sub-section. In his view they were not " lands " because they were subject to a trust for sale under the deed of April 11, 1905, and were thus to be regarded as converted into personal estate for all relevant purposes. In deciding that they were not " chattels " he followed the decision of Eve J. in *In re Exmouth's Annuity* (1). His decision covers certain other points, but we must first consider whether he was right in holding that the London freeholds were neither lands nor chattels within the sub-section. If he was right in so holding, no other question arises on this part of the appeal.

It is now contended on behalf of the Duke (1.) that in considering whether any property comes within the sub-section the court should not consider what was the nature of the property originally settled by Act of Parliament, but should consider only what was the nature of the property at the death of the person whose death gives rise to a claim for duty, that is, at the death of the ninth Duke on June 30, 1934; (2.) that the words " lands or chattels " in the sub-section are intended to cover every kind of property, real or personal; (3.) that the London freeholds were on June 30, 1934, and still are, " chattels " or alternatively " lands " within the meaning of the sub-section. We are prepared to assume for the moment, in favour of the Duke, that his first contention is correct. As to his second contention, we are satisfied that the words " lands or chattels " cannot have been intended to cover real and personal estate of every kind. The opening words of s. 1 of the Finance Act, 1894, are as follows: " In the case of every " person dying after the commencement of this part of this " Act, there shall, save as hereinafter expressly provided, be

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(1) [1925] Ch. 280.

"levied and paid, upon the principal value ascertained as "hereinafter provided of all property, real or personal, settled "or not settled, which passes on the death of such person a "duty called 'estate duty'." The comprehensive phrase "all property, real or personal" is to be noted. Coming to s. 5, the opening words of sub-s. 1 are "Where property in "respect of which estate duty is leviable, is settled by the will "of the deceased." Sub-section 2 refers to "any settled "property," sub-s. 3 to "settled property" and sub-s. 4 to "property comprised in a settlement." Then follows sub-s. 5, which begins: "Where any lands or chattels are so settled," etc. In our view, the conclusion is quite irresistible that the legislature is here turning to a case in which particular kinds of property are settled in a particular way. If the sub-section had been intended to apply to every kind of property so settled, it seems quite inconceivable that the legislature would have employed so marked a change of wording at this point. In that event the sub-section would surely have begun: "Where any property, real or personal, is so settled," etc., or "Where any property is so settled," etc.

Turning to the question whether the London freeholds (assuming for the moment that they are not "lands") are "chattels" within the meaning of the sub-section, we think there can be only one answer to this question. The word "chattels," in a suitable context, may, no doubt, cover a wide field of property, but we have to form a view as to its meaning in this sub-section. The same question was considered by Eve J. in *In re Exmouth's Annuity* (1), and that learned judge expressed himself as follows:—"In my opinion the original "annuity was inalienably settled by the Act creating it and "the same attributes attached to the redemption moneys, but "I cannot bring myself to hold that these moneys are chattels "within the meaning of that word in the sub-section. No doubt "'chattels' is a word of wide signification and in certain "circumstances has been held to cover every sort of personal "property, including money, choses in action, and the whole "of a testator's residuary personalty; but this very elasticity "of meaning demands a close scrutiny of the context in which "the word is used before its true meaning can be satisfactorily "determined. Now in this sub-section it cannot, I think, "have been intended to exclude from aggregation under s. 4 "all personalty capable of being included in the word 'chattels,'

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(1) [1925] Ch. 280, 285.

"if settled in manner therein stated; otherwise one would "have expected to find some such expression as 'where any "'property real or personal is so settled' in the place of the "words 'where any lands or chattels are so settled.' It "follows that some restriction must be imposed on the word "'chattels,' and surely in collocation with settled lands settled "chattels conveys a very definite meaning. It does not suggest "personalty generally but those particular items of it which "are usually settled upon trusts that follow as far as may be "the devolution of the settled land, in other words, heirlooms. "It appears that there are in existence certain chattels— "pictures and plate—of the nature of heirlooms inalienably "settled by statute to which therefore the special modification "contained in the sub-section is applicable, and in these circumstances it is not necessary to cast about for an explanation "of the language employed. In my opinion that language "cannot properly be construed as contended for by the "applicants." We agree with this reasoning, and therefore hold that the London freeholds, if they are to be treated as converted into personalty, are not "chattels" within the meaning of the sub-section.

We must next consider whether the London freeholds are "lands" within the meaning of the sub-section, and we shall continue to assume, in favour of the Duke, that the position must be considered as at the death of the ninth Duke on June 30, 1934. At that date, the London freeholds were undoubtedly lands in fact, and it is contended by counsel for the Duke that the trusts of the deed of April 11, 1905, were not such as to convert them into personalty. Counsel conceded, however, that if the deed did operate to convert the London freeholds into personalty for the purposes of transmission and devolution, they must also be regarded as converted into personalty for fiscal purposes. Turning to the deed of April 11, 1905, and passing over for the moment the lengthy recitals, cls. 1 and 2 contain conveyances of the London freeholds to the three trustees. Clause 3 is as follows:—"The "said Sir Charles Rivers Wilson Mackworth Bulkley Praed "and Ivor Churchill Guest or the survivors or survivor of them "or other the trustees or trustee for the time being hereof "(hereinafter called the trustees or trustee) shall stand "possessed of all the lands messuages tenements and hereditaments hereinbefore conveyed upon trust to sell the same." We pass over cls. 4 to 9 with the comment that they do not

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impose any fetter upon this trust for sale. Clause 10 gives the trustees power, subject to any contrary direction by the court, to retain unsold any properties then or thereafter subject to the settlement during such period as they may think fit. Clause 11 is in the following terms: "Notwithstanding anything herein contained no sale of any hereditaments for the "time being subject to the trusts hereof or of any right or "interest therein or thereover and no purchase of any hereditaments under any power herein contained and no investment of any capital money for the time being held on the "trusts hereof and no change of any investment for the time "being held on the trusts hereof shall (except in pursuance "of an order of the court) be made by the trustees or trustee "without the previous consent in writing of the present Duke "during his life and after the death of the present Duke without the previous consent in writing of the person in whom the "Dukedom of Marlborough settled by the said Act 5 Anne, "Chapter 3, shall for the time being be vested thereunder if "such person shall be of full age Provided that if the present "Duke during his life or such other person as aforesaid after "his death shall at any time from unsoundness of mind or for "any other reason be incapable of giving such consent then "and so often as the same shall happen no such consent shall "be necessary during the continuance of such incapacity."

Counsel submitted that this clause, for a period which might last for ever, imposed such fetters on the trust for sale contained in cl. 3 of the deed that it did not operate to effect a conversion. Alternatively, counsel submitted that no trust for sale arose until the consent of the holder of the Dukedom of Marlborough had been given, or an order of the court authorizing the sale had been made, or the holder of the Dukedom was incapable of giving his consent.

The doctrine of conversion arose, no doubt, from the rule of equity which considers that as being done which ought to be done, and the courts might have taken the view in the past that if a sale under the trust for sale in a deed is only to take place with the consent of A.B. no conversion takes place until such consent is given to the trustees. It might have been held that then, and only then, does it become the duty of the trustees to sell, and then, and only then, does conversion take place in equity. It is, however, well settled that if real property is vested in trustees on trust for sale with the consent of A.B., the consent is treated as intended to regulate the exercise of the trust for sale, but not to prevent the trust for sale from being an immediate trust; and if there is an immediate trust for sale, whether subject to consent or not, the trust operates at once to effect a conversion. See, for instance, *Attorney-General* v. *Dodd* (1); *In re Ffennell's Settlement* (2). It is also well settled that the existence of a power to postpone sale does not prevent conversion taking place. *In re Wagstaff's Settled Estates* (3), *In re Johnson* (4).

Counsel for the Duke relied in particular on the cases of *Sykes* v. *Sheard* (5), and *In re Goswell's Trusts* (6). The former of these cases was a contest between a vendor and purchaser of land, and Sir John Romilly M.R., after stating his views on the construction of a somewhat curious will, held that the purchaser's contentions were correct and that the vendor had not shown a good title. The vendor appealed and the case came before Knight Bruce and Turner L.JJ. (7). Knight Bruce L.J. said: " I am of opinion, that this title is much too " doubtful to be forced upon a purchaser." Turner L.J. said: " This case turns upon the construction to be put upon the " words 'consent in writing of my sons and daughters.' " Even if we were clearly of opinion that after the death of any " of the sons or daughters the consent of the survivors would " satisfy the words, we could not feel any reasonable certainty " that future judges would be of the same opinion, in the " event of the sale being hereafter impeached by any of the " persons beneficially interested." It is clear that the lords justices felt considerable doubt whether the construction which the Master of the Rolls had placed on the will was correct, and we share those doubts. The question whether the testator's will operated to convert his real estate was not discussed, and we do not regard this case as of any assistance on the question which we have to decide. In *In re Goswell's Trusts* (6), Younger J. (as he then was) had to consider the effect of a deed in unusual terms, executed in unusual circumstances. After reviewing certain authorities, he expressed himself as follows:—" The result of the authorities accordingly " appears to me to be that there is no rule which requires the " court to place any other than a natural construction upon " such a clause as has here to be construed, and certainly not

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(1) [1894] 2 Q. B. 150.
(2) [1918] 1 Ch. 91, 98.
(3) [1909] 2 Ch. 201.
(4) [1915] 1 Ch. 435.
(5) 33 Beav. 114.
(6) [1915] 2 Ch. 106, 113.
(7) (1863) 2 De G. J. & S. 6.

"in a case like the present where the consent required is one "which is to be given by the settlors themselves and no others "where the deed itself appears to contemplate that the real "estate comprised in it retains after execution of the deed its "character of realty, and where unaccompanied by the request "there is in terms no trust for sale at all." On the construction of the deed, he held that the real estate comprised therein and still unsold was not converted. In our judgment that case turned entirely on the construction of an unusual document, and the decision in no way affects or qualifies the general rules which we have already stated.

In the present case the first trust in the deed is the trust for sale contained in cl. 3. It is expressed in the clearest possible terms and is, on the face of it, an immediate trust for sale. It is true that, under cl. 11, the trustees cannot sell without obtaining either the consent of the Duke of Marlborough for the time being (if of full age and sound mind) or an order of the court, but in our view, in the light of the authorities already referred to, this fact cannot operate to prevent the trust for sale contained in cl. 3 from being an immediate trust for sale, effecting an immediate conversion of the London freeholds. Even if the recitals were disregarded, we think it is quite clear that the deed would have so operated. If, however, the operative part of the deed had left this matter in any doubt, that doubt would have been completely removed by the recitals. They reveal at once that the object of the deed was to make it clear that the London freeholds "ought to be "deemed temporary investments only" of the pension redemption money "and as in equity personal estate," and that they should "be made subject to a trust for sale accordingly."

For these reasons we feel no doubt that the London freeholds must be considered as being personal estate at the date of the death of the ninth Duke, and are not "lands" within s. 5, sub-s. 5, even if we assume in favour of the Duke, that the death of the ninth Duke is the relevant date at which to consider the nature of the property. If however, we ought to consider the nature of the property which was originally settled by the Act 5 Anne, c. 4, or the nature of the property settled by the Act of 1873, it becomes even more clear that s. 5, sub-s. 5, of the Finance Act, 1894, cannot apply in the present case. The former Act settled the pension, and the latter Act settled the moneys applied in redeeming the pension, and in our view neither the annuity nor the redemption moneys could possibly be " lands or chattels " within the meaning of the sub-section. The Attorney-General argued that the real question was " Did " the relevant Acts of Parliament settle lands or chattels ? " and that any subsequent changes in the nature of the property were quite irrelevant. There is, we think, much weight in the arguments put forward by the Attorney-General, but it is unnecessary to state them fully or to arrive at a final conclusion on them, since in our view the appeal must fail, whether we consider the nature of the property originally settled or the nature of the property which passed on the death of the ninth Duke.

Vaisey J. went on to express a view on the question whether the London freeholds were or were not " settled . . . . " by Act of Parliament," within the meaning of s. 5, sub-s. 5. On the view which we take of the case, this question does not arise, and we do not desire to make any observations on it which would necessarily be obiter dicta. At the same time, we do not wish it to be thought that we agree with the view of the learned judge on this part of the case. For the reasons already stated we are of opinion that the London freeholds do not come within s. 5, sub-s. 5, of the Finance Act, 1894, and that the appeal on this point must be dismissed.

We must now deal with the cross-appeal by the Crown, in regard to the investments representing proceeds of sales of portions of the Parliamentary estates settled by an Act 5 Anne, c. 3. Vaisey J. dealt with this question in the following words : " By a parity of reasoning applied to the converse " case of the investments and sum of cash representing proceeds of sales of portions of the Parliamentary estates I hold " that these were 'lands' within the meaning of the sub-section, " and that they, equally with the unsold portions of those " estates, are entitled to the benefit of the sub-section. It was " admitted, I think, by Mr. Stamp that this result would " follow if I decided, as I have decided, that the pension fund " freeholds were, so to speak, merely personal estate masquerading as realty. These investments and that sum of " cash are, in my judgment, to be regarded as 'lands' under " the temporary guise of personal property ; see s. 75 of the " Settled Land Act, 1925." Before us, the Attorney-General conceded that the cross-appeal must be dismissed, for the reasons stated by the learned judge, if we decided that the London freeholds were not " lands " within s. 5, sub-s. 5, of

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the Finance Act, 1894. In our view the concession was rightly made and, accordingly, the cross-appeal must be dismissed.

Appeal and cross-appeal dismissed.

Solicitors for the Duke: *Nicholl, Manisty & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

J. W. H.

[1945 Ch. 158. *In re* Shelton's Settled Estates. | *Distinguished. In re* Playfair, decd. [1951] 1 Ch. 4

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Jan. 11, 12, 18.

In re SHELTON'S SETTLED ESTATES.

SHELTON *v.* SHELTON.

Will—Settlement—Referential trusts—Estate tail—Real estate settled by will on trusts of real estate in previous settlement—Base fee created before will and enlarged after death of testator—Accretion or independent settlements.

By his will and codicil, dated respectively September 2, 1896, and December 23, 1898, a testator settled the W. property (subject to a life interest, which expired in 1942) on "the same trusts with "the same powers and for the same intents and purposes as the said "S. estates or as nearly corresponding thereto as the circumstances "of the case will admit." By a deed of settlement made in 1868, the S. estates were settled on limitations in tail male. In 1894 a tenant in tail in reversion executed a disentailing deed in respect of the S. estates, which only created a base fee. The testator died in 1898. By a deed, dated in 1899, the base fee was enlarged into a fee simple.

A summons was taken out to determine the devolution of the W. property, having regard to the transactions which had taken place in relation to the S. estates since the settlement of 1868:—

Held, that, in ascertaining the way in which the W. property devolved, the creation and existence of the base fee during the life of the testator could not be ignored, but must be included as one of "the circumstances of the case" within the meaning of that expression in the will; that that circumstance was not of such a character as to preclude the possibility of formulating trusts corresponding to the trusts to which the testator had made reference; and that equity would not allow the intention of the testator to be frustrated, and the trusts to fail for want of the necessary ingenuity to frame the corresponding trusts.

Adjourned Summons.

By his will, dated September 2, 1896, the testator, Frederick

Shelton, devised all his real estate at Wraysbury (hereinafter called "the Wraysbury property"): "to the trustees for the "time being of the estates at Sandhurst in the county of Kent "of which I became tenant for life on the death of my late "brother Captain William Shelton and of which my eldest "son Frederick William Shelton Shelton of Bath is next in "succession on my decease To be held by them upon the "same trusts with the same powers and for the same intents "and purposes as the said Sandhurst Estates or as nearly "corresponding thereto as the circumstances of the case "will admit." The will also contained a residuary devise and bequest in favour (in the events which happened) of the testator's granddaughter, Dorothy St. John, and there was a direction, in an event which did not happen, for the payment and transfer of the residue "unto the trustees for the time "being of the said estates at Sandhurst and Wraysbury to be "held by them upon the same trusts and with the same powers "and for the same intents and purposes as the said estates "or as nearly corresponding thereto as the circumstances of "the case and the differences between realty and personalty "will admit."

By a codicil, dated December 23, 1898, the testator gave the Wraysbury property to his daughter Catharine for her life, and on her death to the trustees for the time being of the Sandhurst estates "on the trusts and in the manner in my "will mentioned."

The testator died on December 30, 1898. William Shelton, who was the testator's elder brother, was married and died without issue on October 29, 1894. The testator had two sons, namely, Frederick William Shelton Shelton (hereinafter called "the elder son") (who was married in June, 1894, and died in 1923 without issue, and whose wife died in 1938), and Norman Wilfred Shelton, and two daughters, Catharine Shelton and Mary Agnes Sybil Shelton. Norman Wilfred Shelton (hereinafter called "the younger son") died in January, 1940, leaving two sons, Ralph Norman Shelton and Lawrence Hugh Shelton. Catharine Shelton died, unmarried, on October 7, 1942. Mary Agnes Sybil Shelton married Robert Henry Beauchamp St. John, and died on July 31, 1915, leaving one child, Dorothy St. John.

The Sandhurst estates had, by an indenture dated May 8, 1868, been settled to the following uses, namely, to the testator's brother William for life, with remainder to his sons successively in tail male, with remainder to the testator for life, with remainder to his sons successively in tail male, with remainders over, and trusts were thereby constituted for the purpose of preserving contingent remainders and of exercising certain powers of management during infancies. Consequently, according to the tenor of those limitations, the elder son became on the death of the testator tenant in tail male by purchase in possession.

On June 25, 1894, with a view to his marriage, the elder son executed a disentailing assurance of the Sandhurst estates. His tenancy in tail male was then in reversion, and, as no consent of the protector (his uncle William Shelton) was obtained, the assurance only operated (as it only purported to operate) to create a base fee. By two deeds dated June 26, 1894, the elder son settled the estates upon himself, his wife and issue, but the property of the elder son which was comprised in that settlement, in the events which happened, reverted on the death of his widow to the estate of the elder son and passed under his will to the younger son and ultimately, under the will of the younger son, to his executors, Laurence Hugh Shelton and Ralph Norman Shelton. The first of the two deeds of June 26, 1894, contained a covenant by the elder son, in effect, to enlarge the base fee into a fee simple.

By a deed dated February 14, 1899, the elder son, who had become tenant in tail in possession, granted the Sandhurst estates to the use of the trustees of the conveyance of June 26, 1894, " so as to enlarge the base fee heretofore subsisting into " a fee simple absolute."

A summons was taken out by Ambrose Timbrill Shelton, one of the trustees of the settlement made by the will and codicil of the testator, to determine (1.) whether the Wraysbury property (including capital moneys representing the portions of the property which had been sold) had, since the death of Catharine Shelton, been held or stood limited in possession on one and, if so, which of the following alternatives: (*a*) for Ralph Norman Shelton as tenant in tail male; (*b*) for Dorothy St. John, as the person entitled to the residuary estate of the testator, on the ground that the limitations of the estate after the death of the tenant for life were inoperative or had failed; (*c*) for the present trustees of the conveyance and marriage settlement of June 26, 1894, and (*d*) for the executors of the will of the younger son as beneficially entitled under the will of the elder son.

Wilfrid Hunt for the plaintiff.

Winterbotham for Laurence Hugh Shelton. The trusts of the Wraysbury property follow those of the Sandhurst estates as they stood at the death of Catharine Shelton in 1942, all transactions which took place between 1868 and 1942 being taken into consideration: see *In re Paul's Settlement Trusts* (1). The question in the analogous case of *In re Slade* (2) is purely one of the construction of a particular will. There the testator had given his property for a purpose which had wholly ceased to exist. There is no such position in the present case. [He also referred to *In re Campbell's Trusts* (3); and *In re Gooch* (4).]

Geoffrey Cross for Ralph Norman Shelton. Three questions arise, namely, (1.) must the settlement of 1868 be considered by itself? (2.) must it be considered together with the base fee, which was created before the date of the testator's death? and (3.) must it be considered together with all the transactions which took place with regard to the Sandhurst estates down to the death of the tenant for life, Catharine Shelton, in 1942? If the Wraysbury property is settled on the basis of the settlement of 1868 only, this defendant became, on the death of Catharine Shelton, tenant in tail in possession of it. The testator's dispositions cannot be treated as making the Wraysbury property an accretion to the Sandhurst estates. A separate settlement after the death of the tenant for life, by referential trusts to the Sandhurst estates, is created. The testator is looking at the settlement of the Sandhurst estates to determine who are to take the Wraysbury property. Although the testator does not actually mention the settlement of 1868, except by implication, he was clearly, at the time of his death, aware of the terms of that settlement.

The true construction of the will and codicil is that that there is a simple reference to the trusts of the Sandhurst estates contained in the settlement of 1868. In order to bring in any alterations under those trusts due to the creation of the base fee, it would be necessary to have something more than a mere reference in the will to the trusts of the settlement.

Lindner for Dorothy St. John. This defendant is entitled to the Wraysbury property as the residuary legatee of the testator. The will is ambulatory until his death, and the position with regard to the Wraysbury property at the date of his death prevails. If the submission, that the will is prima facie the last word of the testator and that the date of his death is the date on which the general principles must be considered, is accepted, the argument on behalf of the first defendant, in which it is sought to include the enlargement of the base fee—which took place after the testator's death—among the transactions fails. As to the base fee, this, so far as it could be applied to the Wraysbury property, could not, in the events which happened, be enlarged and therefore failed. The provisions of the will with regard to the Wraysbury estate having, therefore, failed, the Wraysbury property falls into residue. He referred to: *Badham* v. *Mee* (1); Gray on Perpetuities, 4th ed., p. 34, footnote 5; Halsbury's Laws of England, 2nd ed., Vol. 27, p. 692.

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(1) [1920] 1 Ch. 99.

(2) (1920) 89 L. J. (Ch.) 412.

(3) [1922] 1 Ch. 551.

(4) [1929] 1 Ch. 740.

Burnett-Hall for other parties interested.

Cur. adv. vult.

Jan. 18. VAISEY J. read a judgment, in which he stated the facts and continued: From the death of William Shelton on October 29, 1894, to his own death on December 30, 1898, the testator was tenant for life of the Sandhurst estates and protector of the settlement. It appears not to be known, and it may be immaterial to know, whether any approach was made to him by the elder son for his consent to the enlargement of the base fee; it is even possible that he was unaware of its existence. In fact the base fee continued to exist as such until after the death of the testator, that is to say, until by a deed dated February 14, 1899 (subsequently in due course enrolled), it was enlarged into a fee simple. The Sandhurst estates have all been sold, and the proceeds have passed to the executors of the younger son. There is no difficulty about the due devolution of the Sandhurst estates, but the fate of the Wraysbury property is what I am now deciding. The problem is, in my judgment, a difficult one. Whatever the nature of the settlement of the Wraysbury property, it is clear that Catharine Shelton was the protector of it. No one has disentailed or purported to disentail the Wraysbury property or any part of it at any time. These points at least are clear.

Let me attempt at this stage to indicate the difficulties by setting out the several possible views of the matter. First, it

(1) (1832) 1 My. & K. 32.

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may be said that the "trusts powers intents and purposes" to which the testator refers are those to be found in the settlement of 1868, and nowhere else, and that no regard ought to be had to any disposition or dealing with his interest on the part of any particular cestui que use, such, for example, as the conversion of an estate in tail into a base fee or fee simple. On this view the Wraysbury property evidently vested on the death of Catharine Shelton in Ralph Norman Shelton as tenant in tail male by descent. Secondly, we have to consider what would be the consequence of holding that the "trusts powers intents and purposes" do here include the one relevant disposition or dealing which had taken place in the testator's lifetime, so that it is necessary to have regard to the creation and existence (both at the date of the will and at the date of the death) of the base fee in the elder son. Upon that view alternative and conflicting arguments were addressed to me. It was said, on the one hand, (*a*) that the words "or as nearly corresponding thereto as the circumstances of the case will admit" enable and, indeed, compel me to execute the trust as it were cy pres (assuming, that is, that its execution modo et forma is not possible) with the same result as in the first view, because, assuming that there was a base fee in the Wraysbury property, it was never enlarged and in fact determined in Catharine Shelton's lifetime by reason of the death of the elder son without male issue. The other contention was (*b*) that as a base fee cannot be created by will and, indeed, cannot in strictness be "created" at all (the theory being that it is an estate which merely arises by operation of law as a sort of compensation for a frustrated intention, namely, the intention to create a fee simple), the dispositions of the will and codicil save as regards Catharine Shelton's life interest are void and have failed: (*In re Slade* (1),) and accordingly that the Wraysbury property falls as from her death into the testator's residue, and has passed to Dorothy St. John. As to the nature and quality of a base fee, see Lewis on the Law of Perpetuity, p. 268: Gray on Perpetuities, 4th ed., p. 34; and Challis's Law of Real Property, 3rd ed., pp. 325 to 338; see also *Badham* v. *Mee* (2).

Thirdly, there is the view that I have to take into account not only the creation of the base fee in the lifetime of the testator, but also its enlargement into a fee simple after his death, but in the lifetime of Catharine Shelton. If that is

(1) 89 L. J. (Ch.) 412.

(2) 1 My. & K. 32.

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right, the Wraysbury property has followed the Sandhurst estates into the elder son's marriage settlement, passing thence into the estate of the elder son and ultimately into the estate of the younger son. I will deal with this last contention first. It really amounts to saying that the Wraysbury property became a mere accretion to the Sandhurst estates, and must follow them (or, I suppose, the proceeds of their sale) to whatever destination they may reach. In support of this argument *In re Paul's Settlement Trusts* (1) was cited. That was a decision on words which are not the same as we have in the present case, but, even if it applied here, which, in my judgment, it does not, I should have hesitated to follow it having regard to the later authorities of *In re Campbell's Trusts* (2), and *In re Gooch* (3). I see great objections to reading the words "trusts powers intents and purposes" as indicating whatever the trusts etc., affecting the Sandhurst estates might have been at the death of Catharine Shelton, for on that view of the matter it would presumably not have been possible to effect any dealing with the Sandhurst estates without affecting the Wraysbury property at the same time. Such a view of the matter would certainly contravene the presumption in favour of early vesting, and it seems to me that the rights of the persons entitled in remainder after the life interest of Catharine Shelton must (whatever those rights may have been) have been ascertainable at the death of the testator, and not left shifting about, and, as it were, dancing attendance upon and blindly following the Sandhurst estates through all their unpredictable vicissitudes. (See and compare *In re Gooch* (3).)

Fortunately, I have not on this occasion to consider what the position would have been if at the relevant date, whatever that may be, the Sandhurst estates were found to have gone as to one part in one direction and as to another part in another, but such a possibility undoubtedly adds to the risks inherent in the practice of making devises or bequests "by "reference," following the precedent of the practice of legislating by reference which, however convenient, has given rise to a great deal of uncertainty and confusion. In my judgment the third view is untenable and I have to decide between the first and second views, or rather between the claim of Ralph Norman Shelton (who may succeed either under the first view or under head (*a*) of the second view), and that of Dorothy St. John, whose case rests on head (*b*) of the second view.

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(1) [1920] 1 Ch. 99.

(2) [1922] 1 Ch. 551.

(3) [1929] 1 Ch. 740.

I have come to the conclusion that the claim of Ralph Norman Shelton succeeds. If the first view is, as it may well be, the correct view, the road to that conclusion is straightforward, and I need not linger on it. On the whole, however, I incline to the second view, and hold that the creation and existence of the base fee is not to be ignored, but must be included as one of " the circumstances of the case " within the meaning of that expression in the testator's will. On that footing, I am not prepared to accept the counsel of despair which bids me to hold that this particular circumstance is of such a character as to preclude the possibility of discovering or formulating any trusts etc. " corresponding to " the trusts etc., to which the testator has made reference. The " correspondence " must be as near as the circumstances will admit, which of course implies that it may be more or less near and also more or less distant. I am reluctant to lay down with any approach to precision the exact form which the corresponding trusts would take, but, however framed, they would inevitably, so far as I can see, have now carried the property over, the younger son being dead, to the defendant whose claim I am allowing. Mr. Cross suggested that the trust should be for the elder son so long as any issue male of his are living with remainder to the younger son in tail male, but so that at any time, with the consent of Catharine Shelton during her life, the elder son or the heir male of his body for the time being should have power to convert the estate into an indefeasible fee simple. That may well be one way of doing it. Another way that has occurred to me would be the interposition of a long term, say, of 2,000 years in favour of the elder son, limited to cease on failure of heirs male of his body, and conferring powers of appointing the fee simple commensurate with the powers of enlarging a base fee, so that, for example, any exercise of such powers during Catharine Shelton's lifetime would have required her consent. There may be other or better ways than either of these, and it may be necessary to limit the appropriate power of quasi-enlargement to some period allowed by the rule against perpetuities. I do not particularize further, because equity would, in my judgment, find it quite possible to deal with the difficulty somehow and would not permit the intentions of the testator to be frustrated and the trusts to fail for want of the necessary ingenuity of adaptation. I will, therefore, make a declaration in accordance with head (*a*) of para. (I.) of the originating summons.

Solicitors: *Waterhouse & Co., for Winterbotham, Gurney & Co., Cheltenham; Jaques & Co., for Watts & Son, Dewsbury; Iliffe, Sweet & Co.*

J. L. D.

CORRIGENDUM.

In re Palmer [1945] Ch., at p. 11. W. G. H. Cook appeared for trustees of the will.

COHEN J.
1945
Jan. 25.

In re BROWN'S MORTGAGE.

WALLASEY CORPORATION *v.* ATTORNEY-GENERAL.

Local government—Mortgage—Small dwellings—Foreclosure by local authority—Sale—Increase of value of property—Payment out of profits to mortgagor—Legality—Small Dwellings Acquisition Act, 1899 (62 & 63 *Vict., c.* 44), *s.* 6, *sub-s.* 2.

In 1927 certain freehold property was mortgaged, under the Small Dwellings Acquisition Acts, 1899 to 1923, to a local authority. In 1940 the local authority, having at the request of the widow of the mortgagor, as his legal personal representative, foreclosed the mortgage, obtained an order of the court, giving them leave to exercise the power of sale contained in or implied by the mortgage and offered it for sale by auction, but as no purchaser could be found the authority took possession of it. In 1944, the authority, believing that the property had greatly increased in value, wished to make a further attempt to sell it. They were also anxious to give the benefit of any increase in value to the widow, and a summons was taken out to determine the validity of such a payment:—

Held, that having regard to the provisions of s. 6, sub-s. 2, of the Small Dwellings Acquisition Act, 1899, the authority had no power to make such a payment.

ADJOURNED SUMMONS.

By a deed dated October 1, 1927, certain freehold property,

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at Moreton in the County of Chester, was mortgaged to the Wirral Rural District Council. On April 1, 1928, all the property and liabilities of the Wirral Rural District Council were transferred to and vested in the Wallasey Corporation. On October 25, 1939, the mortgagor died intestate, and letters of administration were granted to his widow. In May, 1940, she requested the corporation to foreclose, and handed over the keys of the property to the town clerk. In view of the widow's request and the amount of arrears of mortgage interest the corporation applied for leave to enforce their power of sale, and obtained an order in the Birkenhead County Court, authorizing them to do so.

In November, 1940, the property was offered for sale by auction, but, owing to the depreciation of house property due to enemy action, the reserve price was not reached, and the property was withdrawn, and the corporation took possession of it and thenceforward collected the rent.

In 1944, as the property had become vacant and was believed to have greatly increased in value, the corporation wished to re-open the transaction. They were also anxious, if possible, to give the benefit of any increase in value to the widow by paying to her the proceeds of the sale after deducting therefrom the amount outstanding under the mortgage. A summons was therefore taken out by the corporation to determine whether they were at liberty so to do in view of the provisions of the Small Dwellings Acquisition Act, 1899 (1).

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(1) By Small Dwellings Acquisition Act, 1899, s. 3, sub-s. 3: "Where default is made in complying with the statutory condition as to residence, the local authority may take possession of the house, and where default is made in complying with any of the other statutory conditions, whether the statutory condition as to residence has or has not been complied with, the local authority may either take possession of the house, or order the sale of the house without taking possession."

By s. 5, sub-s. 1: "Where a local authority take possession of a house, all the estate, right, interest, and claim of the proprietor in or to the house shall, subject as in this section mentioned, vest in and become the property of the local authority, and that authority may either retain the house under their own management or sell or otherwise dispose of it as they think expedient."

Sub-s. 2: "Where a local authority take possession of a house they shall, save as hereinafter mentioned, pay to the proprietor either (*a*) such sum as may be agreed upon; or (*b*) a sum equal to the value of the interest in the house at the disposal of the local authority, after deducting therefrom the amount of the advance then re-

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W. L. Blease for the Corporation.
Danckwerts for the Attorney-General.

COHEN J. The Small Dwellings Acquisition Act, 1899, as a result of which statute this application arises, is an act to empower local authorities to advance money for the purpose of enabling persons to acquire the ownership of small houses in which they reside, and lays down the advances which are to be made. Under s. 3, sub-s. 3, of the Act, if the borrower makes default in carrying out the statutory conditions the local authority may either take possession of the house or order the sale of the house without taking possession. Section 5 deals with the position in the event of the local authority taking possession of the house and under it the local authority becomes liable to make certain payments to the proprietor. Section 6 deals with the case where the local authority exercises its alternative remedy of ordering the sale of the house without taking possession. It is on that section that the local authority acted in this case, and in view of this the present application has been made.

[His Lordship then stated the facts and continued :] I can well understand that the corporation do not wish to take advantage of an adventitious rise in the value of the property at the expense of the widow, but the town clerk very properly advised them that they are in the position of trustees and should consider whether it is consistent with that position for them to make a payment to the widow. If it were the case of private trustees, such a payment could not be made without

" maining unpaid and any sum " due for interest ; and the said " value, in the absence of a sale " and in default of agreement, " shall be settled " as therein stated.

By s. 6, sub-s. 1 : " Where a " local authority order the sale of " a house without taking posses" sion, they shall cause it to be put " up for sale by auction, and out " of the proceeds of sale retain any " sum due to them on account of " the interest or principal of the " advance, and all costs, charges, " and expenses properly incurred " by them in or about the sale of " the house, and pay over the " balance (if any) to the pro" prietor."

Sub-s. 2 : " If the local au" thority are unable at the " auction to sell the house for such " a sum as will allow of the pay" ment out of the proceeds of sale " of the interest and principal of " the advance then due to the " authority, and the costs, charges, " and expenses aforesaid, they " may take possession of the " house in manner provided by " this Act, but shall not be liable " to pay any sum to the pro" prietor."

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the consent of all the beneficiaries. I cannot see that the fact that the corporation are trustees not under a private trust but for the rate-payers makes any difference. Unless the trustees are liable to make this payment, they cannot properly do so. Mr. Blease asked me to hold that the words " shall not " be liable to pay " in s. 6, sub-s. 2, of the statute do not denote " shall not pay," and leave the corporation an option. I am unable, however, to take that view, and I hold that on the true construction of s. 6 of the statute, and having regard to their position as trustees for the ratepayers, the corporation must not pay to the legal personal representative of the mortgagor the sum representing the difference between the amount owing to them for principal and interest and the net purchase price received by them on the sale of the property.

Solicitors: *Town Clerk, Wallasey*; *Treasury Solicitor.*

J. L. D.

sapproved and not followed. GRUNDT GREAT BOULDER PROPRIETARY NES, LD. [1948] 1 Ch. 145

ROBERT BATCHELLER & SONS, LIMITED *v.* BATCHELLER.

ROMER J.

1944

Nov. 15, 16, 17, 21, 22.

1945

Jan. 17.

Company—Directors—Retirement by rotation—Annual general meeting —Re-appointment—Replacement at adjourned meeting—Vacancy not filled—Deemed to have been re-elected.

At the annual general meeting of a company two retiring directors were, on a show of hands, not re-elected. A poll having been demanded, it was decided that the poll should be held at a later date and that an item providing for the election of two directors to fill the vacancies should also be dealt with at the later meeting. The retiring directors failed to secure re-election at the later meeting, but the chairman (ignoring the consideration of the item which provided for the filling of the vacancies) declared that they were re-elected under art. 93 of the company's articles which provided that, if their places were not filled up, retiring directors should be deemed to be re-elected. The shareholders, however, then purported to elect the two proposed new directors to fill the vacancies. In an action brought by the company for a declaration that the two new directors and not the retiring directors had been duly elected :—

Held, that, as the notice to the shareholders of the later meeting was not in the proper form, the purported election of the two proposed new directors was invalid; but that, as art. 93 only operated when the known circumstances of a particular case were such as sensibly and legitimately to admit of its application, the claim of the retiring directors to have been re-elected was repugnant to common sense, and failed.

Spencer v. *Kennedy* [1926] 1 Ch. 125; and *Holt* v. *Catterall* (1931) 47 T. L. R. 332, considered and applied.

WITNESS ACTION.

Robert Batcheller & Sons, Ld., was a private company incorporated in 1918. At the annual general meeting held on August 25, 1943, item 3 on the agenda provided for the re-election of the retiring directors, Robert Aubrey Batcheller and Hugh Gordon Batcheller. Item 4 provided for the election of Mrs. Winifred Whiterose Andrews and Percy Edward Dormer to fill the vacancies caused by the retirement of R. A. Batcheller and H. G. Batcheller. On a show of hands the vote for the re-election of the retiring directors was lost. H. G. Batcheller thereupon, in writing, demanded a poll, and it was decided that the poll should be taken on October 28, 1943. It was also agreed that item 4 of the agenda should be dealt with on the same day.

The following document, dated September 23, 1943, was sent to the shareholders: " I have to remind you that the poll " on the election of directors will be taken on Thursday, " 28th October, 1943, at 2.30 p.m., at the offices of the " company at 'Allington,' Yeoman Lane, Bearsted. For " Robert Batcheller & Sons, Ld. Thomas R. S. Batcheller, " Secretary."

At the meeting, held on October 28, 1943, the votes cast were 10,860 for, and 10,979 against, the re-election of R. A. Batcheller and H. G. Batcheller, whereupon the chairman (ignoring the consideration of item 4) declared them re-elected under art. 93 (1) of the company's articles of association. The shareholders present, however, proceeded to consider item 4 of the agenda, and purported to elect Mrs. Andrews and P. E. Dormer to be directors in their place.

An action was commenced by the company against R. A. Batcheller and H. G. Batcheller, claiming that neither of them was a director of the company, and that Mrs. Andrews and P. E. Dormer had been duly elected directors on October 28, 1943. R. A. Batcheller and H. G. Batcheller, by their counterclaim, claimed a declaration that they were, and at all material times since October 28, 1943, had been, directors of the company, and that neither Mrs. Andrews nor P. E. Dormer were, or had been, directors at any time since that date.

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(1) By art. 93 of the company's articles: " Subject as herein provided, if at any meeting at which " an election of directors ought to " take place, the places of the " retiring directors, or some of " them, are not filled up, the retiring directors, or such of them " as have not had their places " filled up, shall, if willing to act, " be deemed to have been " re-elected."

Le Quesne K.C. and *G. D. Johnston* for the plaintiffs.
Harman K.C. and *W. Gordon Brown* for the defendants.

Cur. adv. vult.

Jan. 17. ROMER J., read a judgment, in which he stated the facts and, after considering the evidence, continued: I am satisfied that, at the meeting on August 25, 1943, it was understood and agreed by those present, and not least by the chairman himself, that item 4 on the agenda should stand over and be dealt with at the meeting on October 28, and that it was in fact so adjourned, and I now turn to the question whether a sufficient notice was given of the adjourned meeting. Article 62 of the company's articles provides that " Whenever " a meeting is adjourned for ten days or more, notice of the " adjourned meeting shall be given in the same manner as in " the case of an original meeting." That means, and can in my judgment only mean, that where a meeting is adjourned for ten days or more a like notice of the adjourned meeting is required as is necessary in the case of an original meeting under art. 55. That article is peremptory in form and provides that : " Seven days' notice at the least, specifying " the place, the day and the hour of meeting, and in the case " of special business the general nature of such business, shall " be given in manner hereinafter mentioned to such members " as are under the provisions of these articles entitled to receive " notices from the company." I am unable, therefore, to accept the contention that art. 62 is in this regard merely directory ; it is, in my judgment, mandatory, and must be complied with On its face the document of September 23, 1943, the only document sent out to shareholders which could be treated as a notice, does not profess to be a notice of a meeting at all ; it purports to be merely a " reminder "—unnecessary perhaps but intelligible—of the taking on a particular day, and at a specified time and place, of a poll ; and a poll on a particular topic, namely, the election of directors. Such a poll, and on such a topic, had been demanded at the August meeting, and prima facie the "reminder" can only fairly be read as referring to that poll and to nothing else. In my judgment it is not possible to relate it to a resolution which had never been voted on by a show of hands, on which no poll, accordingly, had already been or could have been demanded and which indeed might never become the subject of such a demand. I am of opinion, therefore, that that document was not a sufficient notice of an adjourned meeting within the meaning of art. 62, and that it was, therefore, not open to the meeting of shareholders, on October 28, 1943, to deal with anything except the taking of the poll. It follows that the purported appointment, at the meeting on October 28, 1943, of Mrs. Andrews and P. E. Dormer to be directors in the place of R. A. Batcheller and H. G. Batcheller was of no effect.

I must now consider whether, in these circumstances, the defendants are right in their contention that they must be deemed to have been re-elected to the board by virtue of art. 93. The defendants' argument on this point certainly has the merit of simplicity. They say that there was a meeting at which an election of directors ought to have taken place; that the places of themselves as the retiring directors were not filled up; that they were willing to act; and that, accordingly, they must be deemed to have been re-elected. Articles similar to art. 93 were considered in two cases to which I was referred. The first of these is *Spencer* v. *Kennedy* (1). The headnote in that case states: "A private company was "governed partly by special articles and partly by Table A. "Table A, art. 70, fixed the qualification of a director as "'the holding of at least one share.' Special art. 20 empowered "the directors to appoint any other 'qualified person' either "to fill a casual vacancy or as an addition to the board. At "a full board meeting on Saturday, November 14, transfers of "shares to two outsiders were duly passed for registration, "after which the transferees were forthwith elected directors. "The transfers were registered on the following Monday:—*Held*, that, though before their appointment the "transferees had acquired an absolute right to registration, "they were not 'qualified persons' before actual registration, "and their appointment as directors was invalid.

"Table A, arts. 78 and 80, provide for one-third of the "directors retiring by rotation at each ordinary meeting and

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(1) [1926] 1 Ch. 125, 135.

" being eligible for re-election, and art. 81 enables the company
" at that general meeting to fill up the office so vacated.

" Article 82 provides that: 'If at any meeting at which
" 'an election of directors ought to take place the places
" 'of the vacating directors are not filled up, the meeting shall
" 'stand adjourned till the same day in the next week at the
" 'same time and place, and, if at the adjourned meeting the
" 'places of the vacating directors are not filled up, the
" 'vacating directors, or such of them as have not had their
" 'places filled up, shall be deemed to have been re-elected
" 'at the adjourned meeting.'

" A director was due to retire by rotation at the annual
" general meeting of Wednesday, November 11, and part of
" the business of which notice was given was the election of
" a director in his place. The retiring director's re-election
" was moved at the meeting, but the matter, though discussed,
" was not finally dealt with, and the meeting was adjourned
" successively to Thursday, November 12, Saturday,
" November 14, and Tuesday, November 17. At the last
" adjournment the original motion for the retiring director's
" re-election was put and lost, and another shareholder was
" proposed and elected in his place.

" *Held* that, as the adjourned meeting was merely a con-
" tinuation of the original meeting at which the question of
" the retiring director's re-election or replacement was
" considered, the proceedings were in order, and art. 82 had
" no application.

" *Semble.* Article 82 only applies to a case where the
" retirement of a director by rotation and the necessity for his
" re-election or replacement is entirely lost sight of at the
" annual meeting."

The concluding part of the headnote appears to be founded on the part of the judgment of Astbury J., which is to be found at p. 135, where he says: "The plaintiff Spencer relies
" upon Table A, art. 82, and contends that as he was neither
" re-elected nor replaced on Wednesday, November 11, the
" meeting, so far as that portion of the business was concerned,
" was ipso facto adjourned to Wednesday, November 18, and
" if the business was not dealt with on that day he was deemed
" re-elected. Though at first inclined to take that view of
" art. 82, I do not on consideration think it correct. It is
" true that Spencer retired by rotation and offered himself for
" re-election at the general meeting of November 11. But

"that meeting was validly adjourned by successive stages to "November 17, and at that continued meeting the resolution "for his re-election was put and lost, so that he was not "re-elected. If the meeting of November 11 had not been "adjourned, or if the question of Spencer's re-election or "replacement had been entirely lost sight of, art. 82 would "have applied, and it would have been the directors' duty to "adjourn the meeting to November 18, and if he was not "re-elected or replaced on that day he would have been "deemed re-elected. But in the present case I think his "re-election was validly dealt with and rejected at the "adjourned meeting on November 17, a continuation of the "original meeting at which the re-election resolution was "proposed, and therefore the plaintiff Spencer is not deemed "re-elected under Table A, art. 82."

In the second case, *Holt* v. *Catterall* (1), Maugham J. expressed the view that the semble in the headnote to *Spencer* v. *Kennedy* was not justified by Astbury J.'s judgment; and this would indeed appear to be the case. *Holt* v. *Catterall* (1) is not very fully reported, and there is rather a meagre account of the facts. The headnote is: "By art. 97 of a company's "articles, 'At the second ordinary general meeting in each "'calendar year, one-third of the directors . . . . shall retire "'from office. A retiring director shall retain office until "'the dissolution of the meeting at which his successor is "'elected.' By art. 100, 'If at any meeting at which an "'election of directors ought to take place the places of the "'retiring directors or some of them are not filled up, then, "'subject to any resolution reducing the number of directors, "'the retiring directors, or such of them as have not had "'their places filled up and may be willing to act, shall be "'deemed to have been re-elected.' *Held*, that if a retiring "director was not re-elected, and if his place was not filled "up at the same meeting, he retained office until his retire-"ment by rotation, since by art. 100 he was to be deemed to "have been re-elected and therefore there was no vacancy "to which a successor could subsequently be elected." Then it says: "This was a motion by which the plaintiff . . . . "claimed against the defendants . . . . a declaration "that the plaintiff was a director of the defendant "company, and an injunction to restrain the defendants "from preventing him from attending meetings of the

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(1) (1931) 47 T. L. R. 332.

" directors of the company and from acting as a director." I should assume, as this was brought on on motion, that the relief then sought was for the injunction and not for the declaration. Counsel for the plaintiff said that the first two defendants were directors of the company. The annual general meeting was held on December 29, 1930. One of the items of business was the election of a director, Mr. Holt retiring by rotation and being eligible for re-election. It was common ground that he was not re-elected. The voting was by show of hands, and nobody demanded a poll. It was common ground also that nobody was elected in his place, so that the question arose whether he did not continue to be a director.

Then he referred to the articles and said: " The case of *Spencer* v. *Kennedy* (1) attributed to Astbury J. a dictum " which, counsel submitted, was not accurate," and he referred to that and to Astbury J.'s decision in it. Mr. Spens, for the defendant, said that in that case there had been a perfectly valid resolution, and the company in general meeting had refused to elect Mr. Holt. That was on December 29, 1930, and on January 12, 1931, Mr. Williams was elected. Therefore, if the plaintiff was to be deemed to have been re-elected at all, he remained so only until a successor was elected.

Maugham J. said: " I have no evidence that a successor " properly so called has been elected. If there was no vacancy, " the only thing that could be done was to elect an additional " director, and the whole point against you is that there was " no vacancy." Then Mr. Spens said: " that the plaintiff " must satisfy the court that he was entitled to remain " a director until the time came for his retirement by rotation."

Maugham J., in giving judgment, referred to the semble in the headnote in *Spencer* v. *Kennedy* (1), and then the report said that he was not satisfied that Astbury J., by his remarks at p. 135, meant to say anything of the kind. He added that in the case before him art. 100 could not be cut down and made to apply only to the case of complete inadvertence of all the members of the company present at the meeting. The defendants, however, said that the plaintiff was, under art. 100, deemed to have been re-elected, and asked the court to read that article with art. 97, and to say that he was appointed only till his successor was elected. The defendants said also that under art. 78 the directors did in fact appoint Mr. Williams, whereupon the plaintiff ceased to be a director. He (his Lordship) did not think that that was a possible view. If a director was deemed to have been re-elected under art. 100, there was no casual vacancy. The result was that the plaintiff must be taken to succeed and the injunction be granted.

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(1) [1926] 1 Ch. 125.

Maugham J. certainly did say, according to the report, that the article there under consideration "could not be cut "down and made to apply only to the case of complete "inadvertence of all the members of the company present at "the meeting," but I do not think that, except for that proposition, *Holt* v. *Catterall* (1) is of any real assistance to me in deciding the present case. It does not appear that any other person had been nominated for election in the place of the plaintiff (the retiring director), and there was no adjournment of the meeting at which he failed to secure re-election; it also seems to have been admitted by the defendants' counsel in argument that the plaintiff must be treated as having been re-elected by virtue of the article then under discussion, the only question being how long he subsequently remained a director. The article considered by Maugham J. in *Holt* v. *Catterall* (1) was for present purposes materially the same as art. 93 in the present case; and, having regard to what he said about it, it is not open to me to hold, even if I desired to do so, that its operation is confined to cases of accidental omission to fill the places of retiring directors. At the same time I cannot but think that such is the main object of an article so framed. But whatever the true scope of the article may be, I am of opinion that it only operates when the known circumstances of a particular case are such as sensibly and legitimately to admit of its application. It is, of course, quite permissible to "deem" a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to "deem" that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to a subject-matter such as that of art. 93, amounts to a complete absurdity.

The poll demanded by H. G. Batcheller took place on October 28, 1943, but by reason of art. 64 the result is to be

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(1) 47 T. L. R. 332.

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regarded as the resolution of the meeting held on August 25, at which the poll was demanded. The result of the poll was adverse to the defendants. The defendants, nevertheless, say that notwithstanding that the majority of shareholders (in whom the power of re-election rested) explicitly refused to re-elect them at the August meeting, and avowedly desired to appoint two other persons in their place, such majority must nevertheless be " deemed ' under art. 93 to have exercised their voting power in a directly contrary sense to that in which they did in fact exercise it, and to have re-elected the defendants to the board. A conclusion so extraordinary is repugnant to common sense, and in my view clearer language than that to be found in art. 93 would be required before the court was driven to accept it. Articles of association are for the use of business men, and are not lightly to be construed, if any other interpretation be fairly permissible, in such a way as to lead to absurdity.

In my judgment the defendants' claim to be directors by virtue of art. 93 accordingly fails. In the result I hold that neither the plaintiffs nor the defendants have made good their respective claims that Mrs. Andrews and P. G. Dormer on the one hand, and the defendants on the other, are directors of the company.

Solicitors: *Oswald, Hickson, Collier & Co.; Berrymans, for Whitehead, Thomas & Urmston, Maidstone.*

J. L. D.

Considered. *In re* WELLSTED'S WILL TRUSTS.
[1948] Ch. 610

Considered. *Re* WELLSTED'S WILL TRUSTS. [1948] 2 All E.R. 209.

In re WAKEMAN.

NATIONAL PROVINCIAL BANK, LIMITED *v.* WAKEMAN.

UTHWATT J.

1945

Jan. 18, 19; *Feb.* 15.

Will—Trustees—Trust for sale and conversion—Whether power to invest proceeds of sale of land in purchase of land—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28.

The trustees of a will were directed to hold the residue of the real and personal property of the testator on trust for sale and conversion and to invest the proceeds of sale in any investments authorized by law. They took out an originating summons to determine whether they had power, under s. 28 of the Law of Property Act, 1925, to invest the proceeds of sale of the real property of the testator in the purchase of land :—

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WAKEMAN *In re.* NATIONAL PROVINCIAL BANK, LD. *v.* WAKEMAN.

Held, that the trustees of the will were not trustees for sale, within the definition of s. 205 of the Act of 1925, and did not possess any power to purchase land.

ORIGINATING SUMMONS.

By his will, dated January 27, 1929, the testator, E. C. Wakeman, appointed the National Provincial Bank to be his executor and trustee and gave his residuary real and personal estate to the bank on trust for sale and conversion, and then provided as follows: "The bank shall out of my "ready moneys and the moneys to arise from such sale, calling "in and conversion of my said real and personal estate pay "my funeral and testamentary expenses and debts and shall "at the discretion of the bank invest the residue of such "moneys in or upon any of the investments authorized by law "for the investment of trust funds." The bank was then directed to stand possessed of the residue and the investments for the time being representing the same on trust for the testator's daughter, for life, and after her death on trust for her children. There was no ultimate gift in default of children. The testator died on June 7, 1932, and his will was duly proved by the bank on August 27, 1932. The daughter was unmarried, and was the sole next of kin of the testator.

At the time of his death the testator was the owner of certain personal estate and of a freehold house, but owned no other land. This house was sold by the bank on November 26, 1932. The sale was made before administration had been completed and a title was made by the bank as legal personal representative. The sale moneys were duly invested and the securities representing them were readily distinguishable from those representing the testator's personal estate. An originating summons was taken out by the bank to determine whether, as sole executor and trustee of the will, it had power (under s. 28 of the Law of Property Act, 1925 (1) or otherwise) to invest in the purchase of land, with or without buildings thereon, moneys representing the proceeds of sale of land which had formed part of the testator's estate.

Wilfrid Hunt for the testator's daughter: The trustees have power, under s. 28 of the Law of Property Act, 1925, to purchase land with the proceeds of sale of land. It is not suggested that they could so use the proceeds of sale of personalty, but only the proceeds of sale of land. The point does not appear to have been dealt with in any reported case, but the view generally taken in the text-books appears to be that trustees for sale have this power. In s. 63 of the Settled Land Act, 1882, which is replaced by s. 28 of the Law of Property Act, 1925, there is an express prohibition with regard to the purchase of land. If it had been intended by the latter section to continue the prohibition, it would have been expressed in some form. [He referred to *In re Kempthorne* (1).] The will appointed the same persons executors and trustees. As legal personal representatives they held the land on trust for sale. If that is not the case, then, if they had waited until an assent was executed, they would have sold as actual trustees for sale. If, therefore, they cannot now do so, it is a mere accident, and if, as appears to be the case, the transaction was not carried out in the proper way, that is no argument against the existence of the power.

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(1) Law of Property Act, 1925, s. 28: "Trustees for sale shall, in "relation to land or to manorial "incidents and to the proceeds of "sale, have all the powers of a "tenant for life and the trustees "of a settlement for the purposes "of the Settled Land Act, "1925 . . . ."

Rink for the National Provincial Bank. The bank has no power to reinvest the proceeds of sale of land in land. The reference in s. 28 of the Law of Property Act, 1925, to "proceeds of sale," does not give to trustees for sale the powers of investment given by s. 73 of the Settled Land Act, 1925, because s. 73 does not confer a power, but, rather, imposes an imperative trust. Secondly, the proceeds of sale cannot, after being invested in something else, be reinvested in land. If there is a power of investment, there is not a power of reinvestment. Thirdly, after the land has all been sold, these powers no longer apply, because the trustees for sale cease to be trustees within the meaning of the Act. Trustees "for sale" are defined in s. 205 of the Law of Property Act, 1925, as "the persons (including a personal representative) "holding land on trust for sale." Apart from any other reason for suggesting that trustees for sale should not be able to invest in land, the whole tendency and the general scheme and effect of the legislature is to exclude them from doing so. Looking at s. 28 itself, it appears that an imperative power is given to the trustees, namely, that they are to have the powers of a tenant for life. If the trustees for sale have sold,

(1) [1930] 1 Ch. 268.

they are no longer trustees for sale and the power of reinvestment has gone.

Hunt, in reply, referred to *In re Whitaker* (1).

Cur. adv. vult.

Feb. 15. UTHWATT J. read the following judgment: The testator's daughter is desirous that the bank should realize part of the securities representing the sale moneys and apply the proceeds in the purchase of a freehold house for her occupation. It is clear that the bank has no such power unless the transaction is authorized by s. 28 of the Law of Property Act, 1925. It is argued that the bank are trustees for sale: that the investments representing the sale price of the land sold by the bank as legal personal representative are proceeds of sale; that the powers referred to include the power to buy land; and that s. 28 applies, so as to confer the power to buy land, notwithstanding the imperative trust for investment contained in the will. I propose to consider first the question whether the bank is a "trustee for sale" at all. If it is not, it is unnecessary to deal with any of the other points raised at the hearing. For the purpose of answering that question I will disregard the circumstance that all the testator's land was sold in the course of administration. That fact, if it be material—a matter on which I express no opinion—cannot assist the conclusion that the bank is a "trustee for sale." The assumed case is, therefore, that, pursuant to a trust for sale contained in a will, all land has been sold by the will trustees and that the proceeds of sale arising from an exercise of that trust are in the hands of the will trustees. Are those trustees trustees for sale? Certain terms used in the Law of Property Act, 1925, are defined in s. 205 of the Act. The section, so far as is relevant, runs as follows: "In this Act, "unless the context otherwise requires, the following ex"pressions have the meanings hereby assigned to them . . . . "'trustees for sale' mean the persons (including a personal "representative) holding land on trust for sale." I am of opinion that will trustees, in the assumed circumstances, are not trustees for sale. The trust contained in the definition does not refer to the terms of any trust instrument. Many trusts for sale of land, indeed, arise by operation of law. The test refers to a state of facts and, as a matter of language, to

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(1) [1929] 1 Ch. 662.

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a state of facts subsisting at the time when the question arises for determination. The language of the definition is clear and does not in my view allow one to put on the phrase "persons holding land on trust for sale"—a gloss which would make it include "trustees who have held, but no longer hold, "land on trust for sale."

The question remains whether in s. 28 the context requires a different meaning to be given to the expression "trustees "for sale." The suggestion is that the phrase here includes trustees who, while not holding any land on trust for sale, have under their control proceeds of sale resulting from an exercise in the past of a trust for sale. In my view neither the language used in the section, nor the subject-matter to which the section is addressed, suggest any such extended meaning. The language used is clear. As regards subject-matter the main point of the section is not to encourage dealings in land but to facilitate dealings with land, and to that end powers are given which may be duly exercised if circumstances so require. There is no reason in the nature of things why trustees who have sold all land at any time held by them should remain endowed with powers which find their origin and meaning in land holding, and which could, if existing, be used only as respects proceeds of sale. It was argued that the construction which I place on the phrase "trustees for sale" in s. 28 would produce whimsical results. On that construction the retention by trustees of any land—however minute in quantity—would keep alive the powers given by the section as regards the proceeds of sale of all land theretofore sold by them, and with the sale of that land all those powers would disappear. That, it was argued, could not have been intended. Again, it was said that, on the same construction, the powers applicable as regards proceeds of sale of land are, under the legislation of 1925, less than the powers formerly exercisable under the Settled Land Acts, 1882–1890, and that this fact is a reason for its rejection. No doubt it is right, where there is used in a statute language which is capable of more than one construction, to consider and to take into account the consequences of alternative constructions, and also previous legislation on the same topic. But here the language used is clear and unambiguous, and the statute must therefore be left to speak for itself. It would be out of place to deal in any detail with the substance of the statements involved in the two contentions. I would only say on the first of these

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contentions that some easily workable definition of "trustees "for sale" was desirable and is given, and, conceding the accuracy of the statements contained in the contention, that its weight disappears when the general point of the section is borne in mind; and on the second contention that I do not think it accurate in fact and that the prior legislation, as regards lands held on trust for sale, proceeds on a footing entirely different from that adopted in the legislation of 1925.

I accordingly hold that the bank is not a trustee for sale within the meaning of the Act, and as trustee of the testator's will does not possess any power to buy land.

Solicitors: *Wild, Collins & Crosse.*

J. L. D.

VAISEY J.

1945

Jan. 17; *Feb.* 21.

PALMER *v.* LARK.

Practice—Vendor and purchaser—Contract—Specific performance—Action by vendor—Default in defence—Motion for judgment—Form of order—Delivery of conveyance and payment of purchase money to be simultaneous.

On a motion for judgment in default of defence in a vendor's action for specific performance of a contract for the sale of real estate, the title to which has been accepted by the purchaser, the order should provide for the delivery by the vendor of a conveyance of the property, together with any documents of title to be handed over, simultaneously with the payment by the purchaser of the purchase money with interest and costs. Interest may be allowed at the rate of four per cent. per annum, if no other rate has been stipulated in the contract and mentioned in the pleadings.

The form of unconditional order on the defendant for payment of the purchase money at a given time and place, used in *Robinson* v. *Galland* (1889) 37 W. R. 396, is not in accordance with modern practice, and should be discontinued.

Cooper v. *Morgan* [1909] 1 Ch. 261 followed.

ACTION.

The plaintiff brought this action for specific performance, with all necessary accounts and inquiries, of a contract made in December, 1943, between the plaintiff, as vendor, and the defendants, as purchasers, for the sale of a house for 300*l*. The usual deposit of ten per cent. on the purchase money was paid and the contract was due to be completed on December 31, 1943. The defendants had taken possession of the property and accepted the title, but refused or neglected to complete the purchase. In default of defence to the action the plaintiff moved for judgment. The only question argued was as to the proper form of order in a vendor's action for specific performance.

E. M. Winterbotham for the plaintiff. I ask for judgment for specific performance in the form used in *Robinson* v. *Galland* (1). The plaintiff should not be compelled to prepare a conveyance, and be ready to hand over the title-deeds, when he does not know, and has no reason to expect, that the defendants will be ready to pay the purchase money. Under the *Robinson* v. *Galland* form of order, the plaintiff is not bound to do anything until the defendant pays. That form of order was definitely approved by Chitty J. It was followed in *Stone* v. *Smith* (2). [Vaisey J. referred to *Morgan* v. *Brisco* (3).] See Form No. 10 in Seton's Judgments and Orders, 7th ed., at p. 2175. Once the master has certified the amount due, the judge can order that the defendant "do pay." In the King's Bench Division the more usual form is that the plaintiff "do recover." In *Tillard* v. *Williams* (4) P. O. Lawrence J. thought that an unconditional order for payment was not unfair. The conditional form of order is of no value. There is no practical way of enforcing it. The vendor brings his deeds and conveyance to the appointment, but the purchaser as a rule does not keep it, and so the vendor cannot deliver the deeds, through no fault of his own, and the defendant does not disobey the order until the deeds are delivered to him. I ask for a form of order that the vendor can really enforce. The moment the purchaser pays the purchase money, he gets the legal estate. If the matter can be carried through by one order there is no necessity to have two. The deeds could be lodged in court.

Cur. adv. vult.

VAISEY J. read a judgment in which (after stating the facts), he continued: The case is of an ordinary character, but two points arose at the hearing which, in my judgment, call for more consideration than they had then received. First, the minutes provided for interest on the unpaid balance of the

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(1) (1889) 37 W. R. 396.

(2) (1887) 35 Ch. D. 188.

(3) (1885) 31 Ch. D. 216; (1886) 32 Ch. D. 192.

(4) Unreported April 29, 1921.

VAISEY J.

1945

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purchase money at the rate of five per cent. per annum. There is, however, no mention of interest in the statement of claim, and though the contract no doubt stipulates for five per cent. I am precluded from acting on that, which involves a reference (which I am not entitled to make) to the contract itself, the rule being that I can only give the relief which the pleading justifies on the face of it ; nothing else may be looked at ; see *Smith* v. *Buchan* (1), and *Young* v. *Thomas* (2). I was invited by counsel to allow the order to say that interest should be computed " at the rate provided by the said contract," but that easy way out would evidently transgress the principle laid down in the cases cited, which rests, I suppose, on the fact that the defendants cannot be taken to have admitted a contract containing any provision beyond those actually pleaded. I am prepared in the present case to direct interest to be taken at the rate of four per cent. per annum, as being the usual rate allowed by the court apart from special agreement.

The second point is the more important. It is that the minutes, following the order made in *Robinson* v. *Galland* (3) contain an unconditional order on the defendants for payment of the amount found due from them. I have made inquiries of the registrars ,and I am satisfied that the more approved modern practice in a case such as this is to make the order in a different form, that is to say, one which neither allows, nor appears to allow, of execution issuing until a subsequent order has been made, which is usually done after the vendor has lodged the deeds (including the executed conveyance) in court; see *Morgan* v. *Brisco* (4). This seems to me to be in accordance with the proper principle.

I was pressed by counsel to consider the defendants in such a case as this as a party already in default, who ought not to be placed, as it were, on a level with the plaintiff who has not done, but has suffered, the wrong which has necessitated the action. I think that this is based on a misconception. The court, as I understand the matter, follows up its decree for the specific performance of the contract with directions framed on the assumption that both parties are going to carry it out. The directions are given impartially, each party is told what to do, no favour being shown to either. It is a fundamental principle that the payment of the purchase money and the delivery of the conveyance are to be simultaneous acts to be performed interchangeably; see *Anspach* v. *Noel* (1), and *Cooper* v. *Morgan* (2). The headnote of the last-named case is as follows:—" Where a " motion for judgment in default of defence is made in a " vendor's action for specific performance of an agreement for " the sale of real estate, the title to which has been accepted " by the purchaser, the minutes should provide for the delivery " of a conveyance of the property to the purchaser on payment by him of the purchase money, interest, costs, and " damages (if any)." Warrington J. said in his judgment in that case:—" It cannot be right to order a purchaser to pay " his purchase money without giving him his conveyance." I am quite aware that orders in the *Robinson* v. *Galland* (3) form have been made quite frequently, down to very recent times. Indeed I find that on a Monday morning in chambers I made one such order myself. See *Austins of East Ham, Ld*. v. *Macey* (4). I know, however, that objection has been taken to the form from time to time by many judges, and I am rather at a loss to know why it did not go out of use, as in my judgment it should have done, after *Cooper* v. *Morgan* (2) was reported. An order on the defendant purchaser to pay, followed by a direction that the plaintiff vendor shall " thereupon " deliver the deeds, etc., might produce most extraordinary results in the event of the plaintiff levying execution and recovering part only of the sum due, assuming, that is, that such levying of execution would, as suggested to me, be possible without any further order being obtained.

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(1) (1888) 58 L. T., 710.

(2) [1892] 2 Ch. 134.

(3) (1889) 37 W. R. 396.

(4) 31 Ch. D. 216 ; 32 Ch. D. 192.

In the present case I make the following order as being that to which the plaintiff is, in my view, entitled:—" Declare that the " agreement dated 1943 in the statement of claim mentioned " ought to be specifically performed and carried into execution " and order and adjudge the same accordingly; and let interest " be computed at the rate of four per cent. per annum on the " sum of *270l.* (the residue of the purchase money for the " property comprised in the said agreement) from December 31, " 1943, when the purchase ought to have been completed " according to the terms of the said agreement to the day to be " fixed by the judge as hereinafter directed; and let the " following accounts be taken (that is to say, (1.) An account of " what is due to the plaintiff for the balance of the said " purchase money and interest and for his costs of this action " such costs to be taxed by the taxing master. (2.) An account

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(1) (1816) 1 Madd. 310, 316.
(2) [1909] 1 Ch. 261.
(3) 37 W. R. 396.
(4) [1941] Ch. 338, 340.

"of the rents and profits of the said property received by the "plaintiff or by any other person or persons by the order or for "the use of the plaintiff since December 31, 1943; and let "what shall be coming upon the said account of rents and "profits be deducted from the amount of the said purchase "money and interest and costs when so computed and taxed "as aforesaid and the balance certified. And it appearing "from the statement of claim that the defendants have "accepted the plaintiff's title to the said property, let the plaintiff be at liberty to prepare and execute a conveyance to the "defendants (as an escrow to be delivered to the defendants "as hereinafter mentioned), such conveyance to be settled by "the judge. And upon the plaintiff, at a time and place to be "appointed by the judge after the said conveyance shall have "been so executed as aforesaid, delivering to the defendants "the said conveyance together with all deeds and writings in "his possession or power relating solely to the said property, "let the defendants at the same time and place pay to the "plaintiff the amount of the said certified balance. And the "parties are to be at liberty to apply as they may be advised."

I desire to add that I sympathize with those who find difficulty in drafting appropriate minutes of order in such cases as this, and are embarrassed by the criticism which their efforts encounter at the hands of judges and officials of the court. I should certainly have thought that a few, say half a dozen, standard forms might have been prepared so as to cover all or almost all the usual combinations of possible circumstances, and officially authorized. I understand, however, that Clauson J. as he then was, did attempt some years ago to have some such forms prepared, but that the task was found to be impracticable; so that it is still necessary for an appropriate form to be made out for each particular case. I do not myself attempt to lay down any propositions beyond such as have seemed to me to be necessary for the present case, and what I have said is not at all likely to reduce to any substantial extent the uncertainty which does undoubtedly surround the subject. I cannot part with the case without expressing my thanks to Mr. Winterbotham for the assistance given to me by his argument.

Solicitors: *Coode, Kingdon, Cotton & Ward, for Orchard & Co., Exmouth.*

H. L. L.

BARBER *v.* WOLFE.

ROMER J.

1945 Feb. 13.

Vendor and purchaser—Specific performance—Decree—Subsequent rescission of agreement—Damages—Practice.

A vendor obtained an order for specific performance of an agreement to purchase certain leasehold property and, on the failure of the purchaser to comply with the order, applied to the court for rescission of the contract, forfeiture of the deposit, and payment by the purchaser of a sum of money by way of mesne profits and of the vendor's costs of deducing and proving his title :—

Held, that the well-established principle that, on rescission, damages will not be awarded, had not been displaced, and that the application for payment of mesne profits failed, but that the vendor was entitled to the other relief for which he asked.

Harold Wood Brick Co., Ld. v. *Ferris* [1935] 2 K. B. 198, considered.

MOTION.

By an agreement, dated August 26, 1943, the plaintiff agreed to sell to the defendant leasehold property for 2,350*l.* for the residue of the unexpired term of ninety-nine years from September 29, 1933. The agreement (which incorporated the Law Society's General Conditions of Sale, 1934 edition), provided by cl. 3 that the date fixed for completion was September 29, 1943, and that the purchase money was to be paid on that day and if not so paid should carry interest at five per cent. until payment.

Clause 9 was in the following terms :—" The purchaser is " now holding over under a furnished tenancy agreement at a " rental of 3*l.* 3*s.* 0*d.* a week. The said weekly sum shall " continue to be payable to the vendor by the purchaser " until such date as the vendor's furniture . . . . shall be " removed. Thereafter until completion of the purchase the " purchaser shall pay to the vendor interest at the rate of " 5 per cent. per annum without deduction of income tax on " the balance of the purchase money by way of compensation " for the use and occupation of the premises."

No deposit was paid when the agreement was signed, but a sum was paid subsequently by way of deposit.

The purchaser having failed to complete the purchase, an action was commenced by the vendor, in which he claimed specific performance of the contract ; alternatively rescission of the contract ; forfeiture of the deposit ; delivery up by the purchaser of possession of the property ; mesne profits ; and

ROMER J.

1945

BARBER v. WOLFE.

damages. On June 19, 1944, an order was made for specific performance of the agreement, which included a direction for computation of interest on the purchase price payable under the provisions of the contract. The Master's certificate made on November 21, 1944, certified a total sum of 2,494*l.* 8*s.* 9*d.* to be due from the defendant for balance of purchase money, interest and costs, and fixed December 21, 1944, as the day for payment thereof. The purchaser failed to pay the said sum, or any part thereof, and the vendor applied to the court by motion for an order in the terms of minutes, which provided that the agreement of August 26, 1943, be rescinded and the deposit be forfeited to the vendor and that the purchaser deliver possession of the premises to the vendor within twenty-one days after service of the order; and that the purchaser pay to the vendor 142*l.* 8*s.* 11*d.* for mesne profits (this sum being in fact the amount certified by the Master to be due for interest under cl. 9 of the contract) and further mesne profits from December 21, 1944, down to the time of obtaining possession.

Fawell for the plaintiff. The vendor is entitled to a sum, in the nature of mesne profits or occupation rent, by way of damages. This is clear from the decision of the Court of Appeal in *Harold Wood Brick Co., Ld.* v. *Ferris* (1). On the failure of the purchaser to comply with a specific performance order, a vendor is entitled to avail himself of other remedies claimed in the writ: see *Hall* v. *Burnell* (2). Consequently, where damages are claimed in the writ as an alternative to specific performance and the order for specific performance proves abortive, the plaintiff is entitled to pursue his claim for damages. So long as the claim for specific performance stands the other remedies cannot be resorted to, but, when that claim is out of the way and the defendant has failed to pay the money due, the plaintiff is restored to his original position and has then, but not earlier, a right to the alternative relief. [He referred to *Sweet* v. *Meredith* (3).] Rescission is granted as a convenient way of giving relief to a plaintiff if he cannot obtain specific performance. The position might be different if the writ contained no alternative claim for damages. [He referred to *Farrant* v. *Olver* (4) and to Seton's Judgments and Orders, 7th ed., vol. 3, p. 2220].

(1) [1935] 2 K. B. 198, 205.
(2) [1911] 2 Ch. 551.
(3) (1863) 4 Giff. 207.
(4) [1922] W. N. 47.

Geoffrey Cross for the defendant. In this case the plaintiff originally chose the remedy of specific performance. He now asks for rescission instead. It is not the practice of the court in such a case to award anything in the nature of damages. The plaintiff is entitled to restitution and, if the defendant had received any rents from the property of which she has been in possession, she might be accountable for them. But she cannot be charged with an occupation rent. A vendor who rescinds forfeits the deposit. If in addition he was entitled to claim payments in the nature of damages, he would be obtaining a double remedy. [He referred to Halsbury's Laws of England, 2nd ed., vol. 29. "Sale of Land," pp. 374-375, and Williams on Vendor and Purchaser, 4th ed., p. 1,004.]

ROMER J. The only point which I think gives rise to difficulty, is the claim of the vendor to the sum of 142*l.* 8*s.* 11*d.*, for mesne profits. The first way in which he puts this claim is by pointing to cl. 9 of the contract which, if the contract had been carried into effect, would have resulted in that sum being payable to him. But, inasmuch as he has elected to come to the court and ask for an order rescinding the contract, it does not appear to me to be open to him now to point to that clause and say: "Notwithstanding the rescission, I am entitled "to the moneys payable thereunder." It seems to me that the consequence of rescinding the contract is, at all events for this purpose, to rescind it ab initio, with the result that the plaintiff is not entitled to the moneys payable under any particular clause, or, at all events, to the moneys payable under cl. 9. Then, apart from that, it is said that he is entitled to something in the nature of mesne profits or occupation rent by way of damages. The position, apparently, is that the defendant remained in personal possession of the property, or, at all events, had control of it, and let somebody else live there, if she did not live there herself. But, as far as I know, there were no actual receipts representing rents which she received from this property. If there were, I think she would be obliged to account for them, but it is not suggested that she has in fact received moneys for which she should account. So the question, as I see it, comes down to this: is she bound to pay something in the nature of compensation, either under some general principle of equity, or as forming part of damages properly awardable to the vendor? The practice is that, if the vendor elects to take a decree for specific performance and that decree is worked out, the certificate is made, and the purchaser fails to complete, the vendor is entitled to come back to the court and ask for the rescission of the contract: but I always thought that if the vendor elected to take that course it was abundantly established that he could not, at the same time, obtain damages for a breach of the contract which he was asking the court to rescind. I still believe that to be the practice.

The relevant cases are summarized in Seton's Judgments and Orders, 7th ed., vol. 3, p. 2220, and they range over a considerable period of time, the latest being a decision of Eve J. in *Hall* v. *Burnell* (1). Whatever be the foundation of the rule I am not sure that it is necessary to inquire into it at the present moment. If that is established, as I think it is, it seems to me that only a decision of a higher court can introduce some new rule. It is suggested in the present case that a higher court has in fact done so, by reason of the decision of the Court of Appeal in *Harold Wood Brick Co., Ld.* v. *Ferris* (2). It is plain that an argument was there addressed to the Court of Appeal to the effect that " there is no case in which a vendor " who has given notice of rescission of a contract has afterwards " recovered damages for non-performance by the purchaser." In that case the vendor apparently did serve a notice on the purchaser purporting to rescind the contract and giving notice that the property would then be sold by tender. The Court of Appeal held, in the circumstances, that the vendor was entitled to damages. But it is to be observed that that is not a case, so far as I know, where any deposit was paid under the contract and forfeited to the vendor. It certainly was not a case where a decree for specific performance had been made, or where, as a result of, or consequent upon, the decree being made, and the subsequent default of the purchaser, the vendor had to come back to the Court of Chancery for what was described by Eve J. in *Hall* v. *Burnell* (1) as " relief by way of rescission." It was a case where the court regarded what had happened merely as a breach of contract amounting to a repudiation of the contract by one party to it, which was accepted by the other party to the contract, who was then in a position to claim damages for breach of contract. Greer L.J. said in his judgment (2): " If one party indicates by his conduct that he is " unable or unwilling, whatever time is given, to perform his " contract, that is sufficient to justify an acceptance of the " repudiation and to entitle the other party to damages, and I

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(1) [1911] 2 Ch. 551.

(2) [1935] 2 K. B. 198, 205.

" base my judgment on the fact that a term which was of the " essence of the contract has been broken by the appellant, and " therefore he is liable for the damages given against him." The other judgments seem to me to be to the same effect.

It does not appear to me that a principle is deducible in *Harold Wood Brick Co., Ld.* v. *Ferris* (1), sufficient to displace the long series of authorities which are binding on me, and which, so far as I know, have been recognized for years as being the practice of this court, namely, that, on rescission damages will not be awarded. The same rule is still accepted as applicable in the latest edition of Williams on Vendor and Purchaser. As I have said, if the rule is to be disturbed, it must be disturbed or altered by a higher tribunal.

But apart from the question of damages, it is then suggested that it would be right to award against the purchaser in this case an occupation rent. There, again, I have the clear authority of North J. in *Hutchings* v. *Humphreys* (2) that in such a case the plaintiff is not entitled to charge the defendant, who is in possession, an occupation rent. Therefore, it seems to me that, so far as the minutes ask for an order on the defendant to pay 142*l.* 8*s.* 11*d.* for mesne profits, I am unable to make that order and it must be omitted from the minutes. Then the plaintiff seeks to add to the minutes a provision entitling him to the costs of deducing and proving his title to the premises and that is conceded on behalf of the defendant. With those alterations the order can go.

Solicitors: *Kingsford, Dorman & Co.*; *Hasties.*

(1) [1935] 2 K.B., 198.
(2) (1885) 54 L. J. (Ch.) 650.

J. L. D.

In re BAILEY, DECD.

BARCLAY'S BANK *v.* JAMES.

ROMER J.
1945
Feb. 6.

Will—Construction—Specific devise of house—Pecuniary legacies—Appointment of " residuary legatee "—Residuary legatee entitled to undisposed of real estate.

A testatrix, in a will made without professional assistance, after giving a house to a devisee named, and several pecuniary legacies to persons named, appointed M.J. her " residuary legatee." The

ROMER J.

1945

Bailey, In re

Barclays Bank v. James

testatrix possessed at her death personal estate worth under 300*l.*, and several houses (besides the house specifically devised) which were worth some 3,500*l.* :—

Held, that there was sufficient context in the will and the circumstances of the case to show that "residuary legatee" was intended to mean "residuary beneficiary," and therefore M. J. was entitled to undisposed of real estate.

Hughes v. *Pritchard* (1877) 6 Ch. D. 24 followed.

In re Gibbs [1907] 1 Ch. 465 distinguished.

ADJOURNED SUMMONS.

By her will, dated October 2, 1943, which was in her own handwriting and had been made without professional assistance, Mrs. F. B. Stafford Bailey left a house in which she lived at Westcliff-on-Sea to H. V. Terry, seven pecuniary legacies of 10*l.* and one of 25*l.* free of legacy duty, to persons named. The will concluded as follows: "I leave Marjorie James, "daughter of Clifford James, as my residuary legatee, and "place on her the responsibility of giving the souvenirs "enumerated below to the persons stated." A schedule to the will contained a list of souvenirs to be given to persons named. The executors of the will took out this summons to determine the question whether the appointment of the residuary legatee carried with it a gift to her of the undisposed of real estate. This was of much greater value than the personalty, which only amounted to 275*l.*

S. H. Droop for the plaintiffs.

Rawlence for the residuary legatee. The expression "residuary legatee," strictly speaking, refers only to personalty, but in a home-made will such as this it cannot be limited to its technical meaning, and it is submitted that the intention of the will was to make Marjorie James the general residuary beneficiary. The recent decision of the House of Lords in *Perrin* v. *Morgan* (1) has made a great difference to the interpretation of technical words used by a testator in such a will as the present. In that case the word "money" without any context was held to have been intended to mean "property." The general rule as to meaning was stated by Joyce J. in *In re Gibbs* (2). But there are cases which show that there may be exceptions to the rule: see Jarman on Wills, 7th ed., at p. 975, and cases there cited, especially *Hughes* v. *Pritchard* (3). See also *In re Methuen and Blore's Contract* (4).

(1) [1943] A. C. 399, 406.
(2) [1907] 1 Ch. 465.
(3) (1877) 6 Ch. D. 24.
(4) (1881) 16 Ch. D. 696.

The testatrix disposed of one of her houses, but did not in terms dispose of the rest. The facts that her personal estate was less than 300*l.* and her real estate, apart from the house specifically given, was worth 3,500*l.* show that she intended to dispose of all her property.

F. C. Watmough for the next-of-kin: "Residuary legatee" can only refer to personal estate, unless there is a context to extend its meaning to cover real estate, and it is submitted that here there is no such context. The decision in *Perrin* v. *Morgan* (1) only concerns the meaning of the word "money," which, as Viscount Simon L.C. said, was a word which might have one of several different meanings. The decision in *In re Gibbs* (2) was distinguished by Eve J. in *In re Stephen* (3), but in that case there was a context, the gift being to residuary legatees of "any of my belongings wherever found." There is nothing to show that the testatrix by the appointment of the residuary legatee intended to give her the whole of her undisposed of real estate.

ROMER J. This summons raises a short but by no means easy point on the will of Mrs. Florence Stafford Bailey, which is dated October 2, 1943, and is in her own handwriting. The testatrix died on January 26, 1944. She made this will while in the hospital at Southend-on-Sea. The question is whether the appointment of Marjorie James as residuary legatee carries with the gift all the undisposed of realty. The personal estate of the testatrix was worth about 279*l.*, but her real estate, which consisted of four small freehold houses in London, and three freehold houses at Southend, was worth about 3,500*l.* The general rule in such a case is in no doubt and was stated by Joyce J. in *In re Gibbs* (4) as follows: "It is well settled "that the words 'residuary legatee' by themselves prima facie "do not apply to real estate, though their application may be "extended so as to do so when the context requires it, and "when a testator directs his real estate to be sold and disposes "of part of the proceeds, it may be taken, I think, that the "appointment of a residuary legatee will pass the rest." That rule, laid down in 1907, is still the rule. But I was referred to *Perrin* v. *Morgan* (1) where the House of Lords dealt with the meaning of the word "money" in a will: Viscount Simon L.C. there said: "I agree, of course, that if a word has

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(1) [1943] A. C. 399, 406.
(2) [1907] 1 Ch. 465.
(3) [1913] W. N. 210.
(4) [1907] 1 Ch. 465, 468.

"only one natural meaning, it is right to attribute that meaning "to the word when used in a will, unless the context or other "circumstances which may be properly considered show that "an unusual meaning is intended, but the word 'money' "has not got one natural or usual meaning. It has several "meanings, each of which in appropriate circumstances "may be regarded as natural." Here the words "residuary "legatee" have only one natural meaning, and thereby differ from the word "money," and prima facie refer to personalty. So that the only question is whether there is sufficient context in this will to extend the natural meaning of the phrase. I have a certain amount of guidance from the decisions in *In re Methuen & Blore's Contract* (1) and *In re Gibbs* (2). There is a specific gift of part of the real estate—48, Argyll Road, Westcliff. It seems to me to be quite plain that the mind of the testatrix was directed to both her real and her personal estate, and when it appears that her personal estate was worth less than 300*l.*, while her real estate was worth about 3,000*l.*, it seems to me that she intended Marjorie James to be her residuary beneficiary. In *Hughes* v. *Pritchard* (3), the will began "I do make and ordain this my last will and "testament as follows" and then after disposing of two freehold farms and some pecuniary and one specific legacy, the testator ended, "and I make A. C. and D. my residuary "legatees." Jessel M.R. held that the real estate not specifically devised passed to A. C. and D. James L.J. asked (4): "Is there any case in which such words as 'I make "'A. B. my residuary legatee' have been held not to pass "real estate if there have been previous gifts of real estate in "the will?" At all events I have come to the conclusion, on the special facts of this case, and having regard to the comparative values of the real and personal estate, coupled with the fact that there is sufficient context in this will to extend the technical meaning of the words "residuary "legatee," that all the real estate not specifically disposed of passes under the will to Marjorie James as "residuary legatee."

Solicitors: *Hatchett, Jones & Co.; Williams & James; T. E. Crocker & Son.*

H. L. L.

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(1) 16 Ch. D. 696.

(2) [1907] 1 Ch. 465.

(3) 6 Ch. D. 24.

(4) Ibid. p. 26.

In re ARKWRIGHT'S SETTLEMENT.

PHŒNIX ASSURANCE COMPANY, LIMITED *v.* ARKWRIGHT.

ROMER J.

1945

Jan. 18, 19, 23.

Settlement—Capital and income—Mining lease—Extension of term—Whether surrender and regrant—Disentailing deed and resettlement—Tenant for life unimpeachable for waste—Proportion of rents payable to tenant for life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 47, 52, 59.

W., the tenant for life of settled estates, which included mines and minerals, in 1882 granted a lease of a coalmine to a company, under the powers contained in the will of a testator who died in 1859, and by order of the court under the Settled Estates Act, 1877. The trustees of the settlement paid three quarters of the rents to the tenant for life, and retained one quarter as capital. In 1916 the estates were disentailed and resettled, subject to overriding estates and interests, W. remaining tenant for life, in possession, with remainder to B. Under the resettlement a tenant for life of full age was entitled to receive all the rents and profits, including the mining royalties. W. died in February, 1925, and B. became tenant for life under the resettlement. In July, 1925, he executed a deed extending the term of the lease granted to the company until 1984, it being agreed that the deed should be executed in that form in lieu of a surrender of the old lease and a grant of a new one. In 1942 all mineral rents and royalties became vested in the Coal Commission. Up till that time the trustees had received the rents, and had continued to retain and invest one quarter thereof :—

Held, that the tenant for life had power under the settlement of 1916 to vary, modify or extend a lease, and that he had exercised that power by the extension deed of 1925, which did not purport to operate by way of surrender and regrant, and in fact did not so operate. The tenant for life was therefore entitled, as between himself and the persons entitled in remainder under the settlement of 1916, to receive the whole of the mining rents and royalties payable under the extended lease down to July 1, 1942.

In re Savile Settled Estates [1931] 2 Ch. 210, and *In re Bruce* [1932] 1 Ch. 316 followed and applied.

ADJOURNED SUMMONS.

By his will, made in 1857, Robert Arkwright settled certain freehold estates in Derbyshire, which included mines and minerals, open and unopened, on trusts under which his grandson William Arkwright became tenant for life, without impeachment for waste, with remainders over. The will gave power to every tenant for life to sink and work mines on the settled property and empowered the tenant for life, and, during any minority, the trustees of the will, to grant leases of the mines and minerals for terms not exceeding twenty-one years, to take effect in possession from the date of the lease. The testator died in 1859, and William Arkwright, as tenant for life, desiring in 1882 to grant a longer lease, obtained an order on petition to the Chancery Division under s. 4 of the Settled Estates Act, 1877, authorizing him to grant a lease of a coal mine to the Staveley Coal & Iron Co., Ld., for the term of sixty-three years from March 25, 1882. The order so made did not specify any proportion of rents to be retained by the trustees. Under s. 4 of the Settled Estates Act, 1877, a tenant for life who was not impeachable for waste, was entitled to receive three-quarters of the net income from mining rents and royalties, the trustees retaining and accumulating the remaining quarter, and the Settled Land Act, 1882, s. 11, contains a provision to the same effect.

On September 9, 1916, William Arkwright and his eldest son, Bertram Harry Arkwright, as tenant in tail, joined in executing a disentailing deed, and on September 11, 1916, they executed a deed of resettlement under which William Arkwright remained tenant for life in possession, subject to certain overriding estates and interests set forth in the Schedule, and Bertram Harry Arkwright became tenant for life in remainder, without impeachment for waste, with remainders over. The trustees were empowered to manage the settled estates during the minority of any tenant for life or in tail, and after providing out of the rents for the maintenance of education of the minor, to accumulate the residue. This was followed by a forfeiture clause to take effect on the happening of any event which should vest the life estate in any person other than the beneficiary, but until such event should happen, the tenant for life was to receive the full rent. If at any time there should be no tenant for life in possession, the trustees were given power to exercise all the powers of a tenant for life under the Settled Land Acts, including power by deed to release, waive or modify any covenants, provisions or conditions contained in any instrument creating a freehold or leasehold rent.

William Arkwright died on February 19, 1925, and Bertram Harry Arkwright became tenant for life in possession. On July 13, 1925, he executed a deed granting to the Staveley Coal & Iron Co., Ld. an extension of their lease, which would have expired in 1945, until December 41, 1984. A schedule contained the form of lease substituted by the deed for the existing lease, and it was expressly provided in the extension deed that the intention of the parties was that the existing term should not be surrendered or merge in the term specified in the schedule, but should be merely extended until the expiration of the period specified, namely, 1984.

On July 1, 1942, all the mineral rents and royalties payable under the lease were taken over and became vested in the Coal Commission under the Coal Act, 1938.

The present summons was taken out by the trustees of the resettlement of 1916, to determine whether the tenant for life was entitled to the whole of the mining rents and royalties received by the trustees down to July 1, 1942, or only to three quarters thereof.

H. N. Armitage for the plaintiffs.

Geoffrey Cross for Bertram H. G. Arkwright, tenant for life in possession. Under the ordinary law, after the execution of a disentailing deed and a resettlement, the tenant for life is entitled to the whole of the mining rents and royalties received under a lease granted under the original settlement, as income: *In re Hall* (1). The principle of that case is that the Settled Land Act, 1925, only regulates the distribution between capital and income of rents received under a lease granted under a settlement as between the parties claiming under that settlement, and not as between the parties claiming under one settlement, and those entitled under another settlement. So that as between Bertram Arkwright and his issue there should be no capitalization of the mining rents under this lease at least until the date when he extended the term. Secondly, assuming I am right on the first point, the question arises, does the extension of the lease make the lease a new lease, subject to s. 47 of the Settled Land Act, 1925, or s. 11 of the Settled Land Act, 1882, which was then in force. The extension deed stipulates that it shall not operate by way of surrender and regrant, and the resettlement gave power to the tenant for life to extend the term of any existing mining lease, without such surrender and regrant, and on construction the consent of the trustees was not required. The tenant for life is not estopped from saying that there has been no surrender and regrant. The Settled Land Act, 1925, s. 59, gives express power to modify existing mining leases, but this does not apply to the present case: *In re Bruce* (2). A mining

(1) [1916] 2 Ch. 488. (2) [1932] 1 Ch. 316.

lease for the purposes of the Settled Land Act, 1882, only means a lease granted under the powers of the Act, "unless "there is a contrary intention expressed in the settlement," see s. 55, sub-s. 3. Such an intention is definitely expressed in this settlement: *In re Rayer* (1). The settlor clearly intended that the rents and profits received by the tenant for life or by the trustees during the minority of an infant tenant for life, should include the "produce of timber and minerals," i.e., the whole of them.

Humphrey King for Robert Arkwright, tenant for life in remainder: I agree with the argument advanced for the present tenant for life up to a certain point. I admit that as he became tenant for life under the later settlement, he can keep the whole of the rents received from a lease granted under the earlier settlement, but the whole position has changed when he executed the extension deed. The extension of the lease granted in 1925 being for over 100 years from its commencement in 1882, could not possibly have operated except by way of surrender of the original lease and grant of a new one. The tenant for life had no power prior to 1926 to grant any extension of the lease, and after 1926 could not extend it for over 100 years from its commencement: *In re Savile Settled Estates* (2). On the facts, therefore, this is quite a different case from *In re Bruce* (3). A man cannot by the expression of his intention change the law. If he can only do what he is purporting to do by the exercise of a power, then he is estopped from saying that he did not exercise the power. It is difficult to see how in *In re Bruce* (3) the question of estoppel became material and here the first defendant is seeking to approve, not to deny, what he stated in the extension deed. In this case the only parties to the deed of extension were the present tenant for life and the Staveley Coal & Iron Co., Ld. The lease cannot be valid as between lessor and lessee, and invalid between the tenant for life and the remainderman.

A. C. Nesbitt for the infant tenant in tail: The trustees have properly accumulated these rents, and the tenant for life is not entitled to receive them. I support the argument of counsel for the tenant for life in remainder as a matter of grammatical construction of the resettlement, and agree that the tenant for life could not extend the lease without the consent of the trustees of the settlement. But apart from

(1) [1913] 2 Ch. 210.

(2) [1931] 2 Ch. 210.

(3) [1932] 1 Ch. 316.

grammatical construction I submit that no power could be given in a settlement to extend a lease, except by way of surrender and regrant. Only the legislature could do that, and it has done so by s. 59 of the Settled Land Act, 1925, which does not affect this deed. Power cannot be given to do anything contrary to the ordinary law then in existence. The judgment in *In re Bruce* (1) is difficult to understand. That case was not affected by the doctrine of estoppel, which got into it owing to the decision of Baron Parke in *Lyon* v. *Reed* (2) referred to in argument. After 1945 it is admitted, there must have been a grant of a new lease as from that date. One act could not have amounted to an extension of one lease, and also to the grant of a new lease as from the expiry of the old one. A lease to commence in 1945 was wholly outside the powers of the tenant for life to grant, and such a lease cannot bind the tenant in tail. The lease was intended to be granted for the benefit of all interests in the settled property: *In re Daniels* (3). It could not be construed as one to take effect out of the common law interest of the grantor. The tenant for life admits that, unless he can show a contrary intention in the settlement, he is defeated by s. 11 of the Settled Land Act, 1882. See *In re Hall* (4). Here no such contrary intention is shown. See Wolstenholme and Cherry, Conveyancing and Settled Land Acts, 10th ed. (1913), at p. 392. In 1916, when the resettlement was made, there were outstanding estates under the will of R. Arkwright so that as from that date there was a compound settlement. Until 1916 the earlier settlement alone prevailed. The first defendant did not succeed to possession as tenant for life under the resettlement but under the compound settlement, consisting of the will, under which the lease was originally granted, the disentailing deed, and the resettlement, and therefore the principle of *In re Hall* (4) has no application.

ROMER J. [stated the facts and continued:] The first question arises in relation to the period when the first respondent became tenant for life in possession, namely, from February 19, 1925, until July 13, 1925, when he entered into the deed purporting to grant an extension of their lease to the Staveley Coal & Iron Co. The trustees during William

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(1) [1932] 1 Ch. 316.

(2) (1844) 13 M. & W. 285, 306.

(3) [1912] 2 Ch. 90.

(4) [1916] 2 Ch. 488, 493.

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Arkwright's life capitalized one quarter of the rents and profits paid by the Staveley Company, and paid only three quarters to William Arkwright. That was plainly right, because he was obviously the person who took his estate under the then existing settlement, and the Act of 1877 operated so far as his rights as tenant for life were concerned. But after his death the trustees continued to set aside one quarter notwithstanding that Bertram had then succeeded as tenant for life. Mr. Cross, on behalf of Mr. Bertram Arkwright, submitted that, although the Settled Estates Act, 1877, operated during the life time of William, it ceased to have any effect on his death, because Bertram's life interest, which fell into possession on William's death, was an interest not under the original will, but under the resettlement of 1916. He says, accordingly, that the position was that in February, 1925, Mr. Bertram Arkwright succeeded to a life tenancy in property which was already the subject of a mining lease which had been granted by his predecessor under another settlement altogether and, therefore, s. 4 of the Act of 1877 ceased to have any effect and he was entitled thenceforth to the whole of the rents and profits.

Mr. Nesbitt, for the infant remainderman, says that that is not so because, in fact, by reason of the overriding interest, and particularly the jointure to which the settlement of 1916 was subject, the result of those interests was that a compound settlement was in existence under which Mr. Arkwright was tenant for life, and the Settled Estates Act, 1877, did not cease to operate.

Mr. Cross relied on the principle which was applied in *In re Hall* (1). The head note is: "Section 11 of the Settled "Land Act, 1882, governs the distribution, as between the "limited owner and the remainderman under a settlement, of "the rents and royalties derived from mining leases granted "under the powers of the Act by the person having the limited "interest under such settlement, but it does not affect the rights "of the limited owner and remaindermen under a subsequent "settlement to which mines already demised have become "subject, and in such a case those rights are governed either by "the provisions of the settlement or by the law relating to open "mines. The plaintiff was entitled under his marriage settlement, made in 1886, during his life, to the rents, until sale, "of one undivided third part, thereby settled, of certain mines

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(1) [1916] 2 Ch. 488.

"devised and settled by the will of his father. In 1895 and "1902 he joined with the tenant for life of one other third part "and the owner in fee of the remaining third part in granting "leases of the mines. Subsequently one-half of one of the other "third shares devolved upon the plaintiff subject to the leases, "and being caught by the terms of the conveyance in his "marriage settlement became subject to it:—*Held*, that the "plaintiff was entitled, during his life or until sale, to receive "the whole of the rents and profits derived from the one-sixth "share in question during the continuance of the leases."

The facts are a little complicated, but I think the head note sufficiently summarizes the facts for the purpose of the point now in question. [His Lordship read the judgment of Peterson J.(1) and continued:] The observations of the learned judge in *In re Hall* (2), although expressed under s. 11 of the Settled Land Act, 1882, are equally appropriate to s. 4 of the Act of 1877. In my opinion Mr. Cross is right in contending that those observations apply to the present case, and it cannot be said that when his client became tenant for life in possession in February, 1925, his interest arose under the settlement under which the original lease had been granted; in other words, he was not the person who, by reason of his estate in the settlement under which the lease was granted, was entitled to receive the rent. I think it necessarily follows that that is so, because the interest in remainder was completely changed; it was taken out of the settlement altogether and was brought into a new settlement, subject to different limitations and interests, and his life interest was a life interest for that purpose. In my judgment, the settlement of 1916, under which the lease was granted, was not the settlement under which this gentleman's life interest arose. There was, for some purposes, a compound settlement, that is from a conveyancing point of view, and the tenant for life under the compound settlement could sell free from the overriding interest; but I do not think that that affects the matter when one inquires, as I have to inquire in this case, whether the present tenant for life's interest is an interest under s. 4 of the Settled Estates Act, 1877. In my view it is not. It is outside it and is conferred solely by the settlement of 1916, with the result that such life interest came into possession at a time after the lease had been granted, and as the tenant for life under the settlement was free from impeachment for waste, although I am not sure whether that is material, he is entitled to the whole of the rents and profits.

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(1) [1916] 2 Ch. 492, et seq. (2) [1916] 2 Ch. 488.

That would cover the period from February 19 to July 13, 1925, when the deed of extension was entered into. It is said that the effect of that deed was to introduce a different state of affairs and that although, having regard to what I have decided on the first point, if this deed had not been entered into and the original lease had remained undisturbed, and that in effect the tenant for life would have continued entitled to the whole of the rents and profits until the lease had run out in 1945, subject, of course, to the effect of the Coal Act, 1938, but that by entering into this deed in July, 1925, he lost a quarter of the rents.

The first point taken by Mr. Cross as asserting his continued right was that he was expressly empowered to grant this lease under the power in the settlement of 1916, that it should be lawful for a tenant for life to vary and extend a lease amongst other things. He says he had that power and that, on the true construction of the settlement, it did not need the consent in writing of the trustees, although the power which immediately precedes it did require the consent of the trustees. He admits that if he is wrong on that he cannot rely on this power because he did not in fact obtain the consent in writing of the trustees to enter into this deed of extension.

As a matter of construction of these provisions, I think it is reasonably plain that this power to release, waive or modify any covenants, provisions or conditions in a lease does require the consent of the trustees. It is one of a series of powers, the first one being that it shall be lawful for the trustees to exercise, in certain circumstances, the powers of the tenant for life. That is followed by a provision " that it shall be lawful for any " person hereby made tenant for life of the said hereditaments, " with the consent in writing of the trustees, to demise for any " purpose the settled hereditaments." That, in turn, is followed by the power which is immediately in question: " and also at any time by deed, either with or without con" sideration in money or otherwise, to release, waive or modify, " either absolutely or otherwise, any covenants, provisions or " conditions contained in any instrument creating a freehold or " leasehold rent charge or in a lease." The words " to release, " waive or modify " are obviously elliptical and one has to fill the gap by referring to what goes before. Where one has found that what goes immediately before is that " it shall be

" lawful for any person hereby made tenant for life of the said " hereditaments with the consent in writing of the trustees to " demise " it seems to me a matter of necessary, or, at all events, reasonable inference, taking it by itself, that one fills the gap in the succeeding provision by inserting the words " and also it shall be lawful for any person with the consent in " writing of the trustees to release, waive or modify " ; and, as a matter of simple construction, I think that one is almost necessarily driven to carry forward what goes before into this additional power. That view is fortified by the reflection that, inasmuch as the consent of the trustees is required to lease, it would be curious if the tenant for life could vary, extend or modify a lease without the consent of the trustees. In my judgment that power can only be exercised by the tenant for life with the consent in writing of the trustees ; and, as that was not obtained, it does not apply.

Secondly, it is suggested on behalf of the tenant for life that the deed is merely an extension of the original term and that it was not, and did not in fact, take effect as a surrender and regrant. On the face of the deed itself that is plainly so, because the parties have gone to great pains, as far as I can see, to avoid any suggestion in the lease of July 13, 1925, that it was in any sense a surrender and regrant, because they say that their intention is that " the term of years granted by the " antecedent lease shall not be surrendered nor merge in the " term specified in the third schedule, but shall be merely " extended until the expiration of the period specified in the " third schedule hereto." That follows a recital that it has been agreed that this deed should be executed " in lieu of " a surrender of the antecedent lease to the lessor and the " execution of a new lease by him to the lessees." It is said that whatever may be the position as between the lessor and the lessees for the purpose of giving force to that transaction, nevertheless the transaction as between the tenant for life and the remainderman must be taken as it stands, and must be regarded merely as a variation and not as a surrender and regrant. Alternatively, it is said that it ought to be treated as binding the life interest of the grantor, if nothing else. The other respondents, the tenant for life and the infant remainderman, say that the transaction could, in law, only take effect by surrender and regrant, and that it must be regarded as so operating for all purposes. They say that the term extended to 1985 is that authorized by the Settled Land Act, 1882, which was in force at the time that the deed was entered into, and that s. 11 of that Act must be taken to apply. Mr. Nesbitt further says that unless it operates as a surrender and regrant, it could not operate as a new lease of the added term because it would not be within s. 7 of the Act, which requires that "every lease shall be by deed, and be made to take effect in "possession not later than twelve months after its date."

The effect of a deed varying the lease by extension of the term was considered by Maugham J., as he then was, in *In re Savile Settled Estates* (1). That case related to s. 59 of the Settled Land Act, 1925, which for the first time, expressly authorized tenants for life to vary, release, waive or modify the terms of any lease whenever made of the settled land. That section did not come into operation until January 1, 1926, and it certainly was not in operation at the time when this deed of extension of July 13, 1925, was entered into. But the learned judge makes some observations which I think are of some assistance to me. The head note is: "The tenant for "life under a resettlement executed in 1884 granted two "mining leases, in 1924 and 1928 respectively, each for the "period of 60 years. On a summons asking for the determination of the question, among others, whether he had power "under s. 59 of the Settled Land Act, or otherwise, to vary "the leases by substituting in each of them a term of 100 years "in lieu of the term of 60 years; *Held*, that he had power to "vary by deed the terms of the leases, provided that their "length after variation should not be more than 100 years "from the respective dates of execution. Observations on "the effect in law of extending the terms of a lease." It is for those observations that I refer to this case. Maugham J. says (1): "It appears that the tenant for life under this "settlement granted certain mining leases for the period that "was authorized by the Settled Land Act then in force— "namely, 60 years. Two leases in particular are mentioned "in the summons, and the tenant for life is desirous now of "altering the terms of those leases, by changing them into "leases for terms of 100 years each from the date when the "leases took effect. The Settled Land Act, 1925, which is in "force, contains two sections which are material in considering "whether the tenant for life has the right to do this." Maugham J. then read s. 52 and s. 59, and continued: "It is "apparent, in my opinion, that s. 59, sub-s. 1, is dealing only

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(1) [1931] 2 Ch. 210, 215.

"with a question of form, because it is clear from the final "words of s. 59, sub-s. 1, that no more is being authorized "than what might have been done under s. 52, sub-s. 1. The "provision in question is that 'every such lease or grant shall, "'after such variation, release, waiver or modification as "'aforesaid, be such a lease or grant as might then have been' "granted after a surrender, etc. In my opinion s. 59, sub-s. 1, "is not limited to cases where the result of the variation, "release, waiver or modification will at common law effect "a surrender and regrant. This section is conferring a power "on the tenant for life to execute documents in a particular "form which he could have executed in another form as the "result of the surrender or the surrender and regrant of the "land previously dealt with. It relates to the widest possible "release, variation, waiver or modification, including cases "in which only part of the land comprised in the old lease or "grant is the subject of those alterations. Speaking generally, "I think there is no doubt that the law (as stated in "Halsbury's Laws of England, (1st ed.), vol. XVIII., s. 1061) is "that any arrangement between the landlord and tenant which "operates as a fresh demise will work a surrender of the old "tenancy, and this may result from an agreement under "which the tenant gives up part of the premises and pays a "diminished rent for the remainder; and I would add that it "may result from the mere alteration in the amount of rent "payable, as seems to have been held in the case of *Donellan* v. "*Read* (1)" That observation must be borne in mind when considering the next case to which I am going to refer, which was decided by Clauson J. Maugham J. continued: "But "the section now under consideration is not concerned with "that matter at all; it is only conferring on the tenant for "life power to do in a particular form that which might have "been done in another way. In my opinion, therefore, the "plaintiff, as the tenant for life, has power, with or without "consideration in money or otherwise, by deed to vary, release, "waive or modify, either absolutely or otherwise, the terms of "either of the two leases mentioned in the first paragraph of "the summons, including the length of the leases there in "question, provided that the leases shall, after the alteration "be leases for terms not exceeding 100 years from the dates "when they respectively took effect. I do not propose in "the declaration to say that it is done under s. 59, but

(1) (1832) 3 B. & Ad. 899.

"I propose to say that the tenant for life has power to execute "such documents. I should add that, in my opinion, an "alteration of an existing lease so that it will operate for "a term extending beyond the original term can operate, in "law, only as a surrender of the old lease and a grant of a new "one, and I am disposed to think that the wiser course in the "circumstances would be to add, after the declaration that "I have mentioned, the statement that 'the declaration is "'made without prejudice to the question whether the leases, "'as altered, will not at common law operate by way of "'surrender and regrant'." (1).

In re Bruce (2) is of obvious importance in relation to the question which I have to decide now. "Under the will of "Lord Robert Bruce, who died in 1912, the plaintiff was "tenant for life in possession of certain beds of ironstone and "other minerals subject to a lease executed in 1908, which "bound the testator and persons claiming under him. The "lease was for a term of forty years expiring on March 25, "1947, subject to the payment of the rents and royalties and "the covenants on the part of the lessees therein contained. "By an order made on July 20, 1916, in the Chancery Division, "in the matter of the estate of the testator, it was declared "that upon the true construction of his will the then tenant "for life in possession was entitled to the whole of the rents "and royalties under the lease. By a deed dated March 25, "1931 (hereinafter called 'the extension deed'), and made "between the plaintiff (who, upon the death in 1917 of his "brother without issue, succeeded to the settled estates as "tenant for life) as lessor of the one part and the lessees of the "other part, pursuant to s. 59 of the Settled Land Act, 1925, "it was agreed that the lease should operate as if the minerals "had been demised for a term commencing on March 25, 1907, "and expiring on March 25, 2006; and the lessor then demised "to the lessees the minerals and mining rights demised by the "lease as from March 25, 1931, until March 25, 2006, subject "to the payment of the rents and royalties and the covenants "and conditions respectively reserved by and contained in the "lease as the same were respectively varied by the extension "deed. And it was further agreed that the lease should be "construed and have effect, as if the term thereby granted "had been a term expiring in 2006 and the variations specified "in the schedule to the extension deed had been originally

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(1) [1931] 2 Ch. 215.

(2) [1932] 1 Ch. 316.

" comprised in the lease; and that, except as varied by that " deed, the lease and the term thereby granted should be " deemed to remain on foot in all respects as if that deed had " not been executed. The question was one between the " plaintiff and his infant son, the first tenant in tail in " remainder, and was, from what date the latter was entitled " to have one-fourth of the rents and royalties capitalized in " his favour under s. 47 of the Settled Land Act, 1925, regard " being had to the order of 1916 and to the question whether " the extension deed operated by way of surrender of the " original term granted by the lease :—*Held,* first, that, even " if the extension deed did operate as a surrender of the original " term granted by the lease and a grant of a new term, the " provisions for capitalization made by s. 47 of the Settled " Land Act, 1925, did not apply to the rents and royalties " accruing during the whole of the original term of forty " years, as the settlement by the construction placed upon " it by the order of 1916 showed a contrary intention within " the meaning of that section. Secondly, that, as between " tenant for life and remainderman, the former was not " estopped from denying that the extension deed operated, " against the intention of the parties to it expressed in that " deed to keep the original term on foot, as a surrender of that " term. Accordingly, that the plaintiff, if and so long as his " tenancy for life subsisted under the settlement, was entitled " to the whole of the rent and royalties which accrued under " the lease as varied by the extension deed during the residue " of the original term of forty years; but that, as from the " expiration of that term in 1947, one-fourth of the rents and " royalties ought to be capitalized, pursuant to s. 47 of the " Settled Land Act, 1925." I think the only further fact which is relevant for present purposes, and which does not appear in the head note, is the following: " By a deed dated " November 2, 1923, and made between the plaintiff, who was " the person then entitled to the reversion expectant on the " term granted by the lease, of the one part and the lessees " thereunder of the other part, it was agreed that the method " of arriving at the royalties payable under the lease should " be varied in the manner therein specified." (1). Then it goes on to state the effect of the deed of March 25, 1931, which was the extension deed.

[His Lordship then read the judgment of Clauson J. in *In re Bruce* (1) and continued:] I think the effect of that judgment is that, at all events if this deed of variation of July, 1925, had been executed after the Settled Land Act, 1925, had come into operation, the decision itself is in point and would entitle the tenant for life to continue to receive the whole of the rents and royalties on the ground that, as between himself and the remainderman, the extension of the term must be construed as an extension, that is to say in accordance with the intention of the parties, according to its tenor. The learned judge says that it is perfectly true that, having regard to the principle that a variation of a lease can in law only operate by its surrender and regrant, if difficulty had arisen between lessor and lessee, and the lessee had brought an action against the lessor for a declaration that the purported deed of variation in fact operated as a surrender and regrant, notwithstanding the terms in which it was framed and the form in which it was framed, the lessor, the tenant for life, would be estopped, as between himself and the lessee, from denying that that was its effect. But that is the extent to which this fiction resulting from estoppel is to be carried. In all other respects, and in particular as between tenant for life and remainderman, the effect of the deed is in accordance with its plain provisions. The deed of extension was in 1931, and s. 59 of the 1925 Act was then in operation. It is, of course, a fact that in the present case, at the date when this deed of July 13, 1925, was executed, there was no such statutory provision in force (and I have already held that there was no express provision in force under the settlement) authorizing the transaction to take this form. I have, however, the guidance of Clauson J. in deciding this case, notwithstanding that in July, 1925, there was no such statutory provision in operation. In *In re Bruce* (1) the tenant for life in the year 1923, at which time there was no such statutory provision operating, had entered into a deed modifying the original lease in a way which, as would appear from the observations of Maugham J. in *In re Savile Settled Estates* (2), could itself only operate in law as a surrender and regrant; and Clauson J. said, although the point was not in issue before him, that it had never been suggested that that deed operated as a surrender of the lease and a regrant of the unexpired period of the lease on the modified terms. The learned judge said: " It is quite obvious from the tenor of the deed that " to construe the deed as amounting to such a surrender and " regrant would be to contradict the intentions of the parties;

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(1) [1932] 1 Ch. 316, 318, 324.

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(1) [1932] 1 Ch. 316.

(2) [1931] 2 Ch. 210.

"but it may be that, as between the lessees and the plaintiff, "the latter may be estopped from denying that the deed so "operated. On this point reference may be made to Baron "Parke's judgment in *Lyon* v. *Reed* (1). I do not, however, "know of any authority for the proposition that any one but "the lessee or some one claiming through or under him, could "rely on the estoppel as against the plaintiff, and accordingly, "had it been suggested that the remainderman could, as "between himself and the tenant for life, have relied on this "deed of 1923 as a surrender and destruction of the lease of "1908, I should have been prepared to hold the suggestion "unfounded." (2).

That is precisely the position in the present case. A deed has been entered into which, so far as intention is concerned, is quite plainly a deed of variation simply and not a transaction of surrender and regrant. True it is that, as between the lessor and lessee, estoppel would operate in favour of the lessee so as to prevent the tenant for life, the lessor, from denying that its effect was, as between those two parties, that of a surrender and regrant. But I see no more reason than Clauson J. did in *In re Bruce* (3) in extending the fiction arising out of the estoppel in such a way as to entitle the remainderman to say that the deed is something which it does not purport to be and that one must look to its legal effect for all purposes, and, amongst such purposes, for the purpose of taking away from the tenant for life one quarter of the rents and profits to which he would otherwise be entitled, and handing them over to capital.

I do not think that the fact that there was no statutory provision for extension until 1925 really makes very much difference, because Maugham J. pointed out in *In re Savile Settled Estates* (4) that s. 59 does not purport to vest or to create new powers of dealing with settled land in a life tenant; it merely authorizes him to carry into effect old powers which formerly existed, and particularly the powers under s. 52, in a new form; and it authorizes a tenant for life to enter into a transaction the legal result of which must be regarded as operating as surrender and regrant by a new form of procedure, namely, by a deed of variation or extension; but the effect in law is precisely the same as it would have been before, namely, it would operate as a surrender and regrant as between lessor and lessee. Be

(1) 13 M. & W. 285, 306.

(2) [1932] 1 Ch. 325.

(3) [1932] 1 Ch. 316.

(4) [1931] 2 Ch. 210.

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that as it may, on this somewhat troublesome question I have a considered opinion of Clauson J. on a position which closely approximates to the point before me on this present summons, and I propose to follow it.

In my judgment the deed of July 13, 1925, between Bertram Harry Godfrey Arkwright on the one hand and the Staveley Company, as the lessees, on the other, may have to be dealt with, should occasion arise, as a surrender of the old lease and a grant of the new one. Nevertheless, I am not bound to hold that it has that effect so as to disturb the respective rights of the life tenant and the remainderman under the settlement. As between them the matter must be treated in accordance with the avowed intention of the parties in the deed of extension, and in accordance with its form. Having regard to the view which I have taken on that, it does not really become necessary for me to deal with the further alternative arguments of Mr. Cross. He said that in any case, if necessary, this deed must be treated as merely binding the life interest of the tenant for life and nothing more. Having regard to the view at which I have arrived, it is not necessary fully to consider the matter from that aspect. I do not think it is a legitimate point. It is plain that that would be acting entirely contrary to the intention of the parties as expressed in the deed, because the scheduled form of the lease, if only taken by itself, shows that it was not to operate merely for the lifetime of the lessor but was to be a valid transaction and disposition binding the tenant for life and the remainderman. I think there would be difficulty in saying that this document is to be treated as having effect during the lifetime of the lessor without regard to anything other than that.

Finally, Mr. Cross submitted that there was in any case a contrary intention to be inferred from the settlement of 1913 within the meaning of s. 11 of the Settled Land Act, 1882.

For that he relied on the provisions authorizing the trustees to enter into possession of the rents and profits during the minority of a tenant for life and in the event of a life interest being forfeited. Mr. Cross's argument on that was that the express provision that the rents and profits on the premises, including the profits of, amongst other things, the mines, quarries or brickfields, would be received by the trustees, who were to use them for the purposes laid down, shows that the whole of the rents and profits of, amongst other things, the mines, were to vest in the trustees, and that the rents and profits to be so received by them must be commensurate with the rents and profits that would be received by the tenant for life in possession if there were a tenant for life in possession. He referred to the principle of such cases as *In re Rayer* (1). I myself do not take that view of the matter. I do not think it is a permissible or possible construction of the statute. These are common form clauses which are put in, and which are to be found almost as a matter of course in such cases as this, and I think it is straining the effect of the language beyond the extent to which it is permissible to give it an effect such as is contended for. The principle in these cases, as I understand it, is that where you have an express power given to a tenant for life to grant a mining lease, coupled with or followed by a provision that the tenant for life is to take the rents and profits, that is a sufficient contrary intention within s. 11 of the 1882 Act to displace the limiting or qualifying provisions of that section. I think this case falls far short of that, if only for the fact that there is here no express power at all to the tenant for life to grant mining leases. It appears to me that the power to grant mining leases is an essential ingredient of decisions such as that on which Mr. Cross relied. Were the matter to rest on that I should not accept that contention, but I should arrive at a conclusion which was adverse to the tenant for life. It does not, however, arise, because I decide this point on the principles which appear to me to have been approved, if not laid down, by Clauson J. in *In re Bruce* (2), which appear to me to be applicable to the present case.

Solicitors: *Field, Roscoe & Co.; Freshfields, Leese & Munns.*

(1) [1913] 2 Ch. 210. (2) [1932] 1 Ch. 316.

H. L. L.

In re WRIGHT'S SETTLEMENT TRUSTS.

WRIGHT *v.* WRIGHT.

ROMER J.
1945
Feb. 21.

Settlement—Marriage settlement comprising shares in company—Proviso for accumulation of dividends after death of settlor—Issue of bonus shares—Conversion of share capital into stock—Original shares and bonus shares—Accretion.

A marriage settlement contained a proviso that, if the wife survived the husband and remarried while children of the marriage

ROMER J.

1945

WRIGHT'S SETTLEMENT TRUSTS, *In re.*

WRIGHT *v.* WRIGHT.

were alive, the trustees should, from her remarriage until twenty-one years after the husband's death or so long as she and any of the children were living, pay her 150*l.* a year out of the income of the husband's fund, and accumulate and invest the surplus income and stand possessed of the accumulated fund on trust to divide it equally per capita between the wife and any child or children then living or, if no children were then living, on trust for the wife absolutely without power of alienation or anticipation of her expectant interest. The husband's fund included shares in a company, and a further proviso directed that, if the husband died during the wife's lifetime leaving a child or children of the marriage, the trustees were to accumulate by way of compound interest any dividends on the shares exceeding in any year seven per cent. on their nominal value, and to hold the accumulations on trusts precisely similar to those of the rest of the husband's fund. At later dates the capital of the company was increased, bonus shares were issued and the whole of the share capital of the company was converted into stock. The husband predeceased the wife, leaving children, and the wife did not remarry :—

Held, that the bonus shares were an accretion for all relevant purposes to the original shares, and that the proviso for accumulation applied to the bonus shares and therefore applied also to that part of the stock in the hands of the trustees which represented bonus shares.

In re Speir [1924] 1 Ch. 359 and *In re Whitfield* [1920] W. N. 256 followed.

ADJOURNED SUMMONS.

A marriage settlement executed in 1908 comprised "the "husband's fund" and "the wife's fund," the husband's fund including 100 fully paid up shares of 100*l.* each in a named company. Clause 4 provided that the trustees should stand possessed of the husband's and wife's funds during the joint lives of the spouses and the life of the survivor of them on trust to pay the income of the husband's fund to the husband and, should the wife survive the husband, to stand possessed of so much of the income of the husband's fund as should accrue after his death and during her life on trust to pay it to her for her separate use : "Provided always that in the "event of the wife surviving the husband and marrying "again at a time when there shall be living any child or "children of the . . . . marriage then as from the date of "such remarriage . . . . until . . . . 21 years shall have "elapsed from the . . . . death of the husband or during "such lesser period as the wife and any child or children of "the marriage shall be living the trustees . . . . shall pay to "the wife . . . . 150*l.* per annum out of . . . . the income of "the husband's fund and shall accumulate and invest the "surplus of such income and shall at the expiration of the "said period of accumulation stand possessed of the fund "formed by such accumulation of income upon trust, if the "wife and any child or children of the . . . . marriage shall "be then living, to pay and distribute the same equally "between the wife and the then surviving children or child "of the . . . . marriage per capita and in the event of the "death of the last surviving child of the . . . . marriage "within the said period of 21 years . . . . leaving the wife "surviving, then on trust for the wife absolutely but without "power to alienate or anticipate her expectant interest but "in the event of the wife having married again and dying "within the said period of 21 years . . . . leaving any "child or children of the marriage surviving then upon the "trusts hereinafter declared concerning the joint fund constituted out of the husband's fund and the wife's fund . . . . "And provided also that in the event of the death of the "husband during the life of the wife and there being any "child or children of the . . . . marriage living at the death "of the husband the trustees . . . . shall during the period "of 21 years from the death of the husband or for such lesser "period as the wife and any child or children of the . . . . "marriage shall be living accumulate by way of compound "interest any dividends in respect of the said shares . . . . "exceeding 7 per cent. on the nominal value of such shares "in any one year by investing the same and the resulting "income thereof and shall hold the said accumulations and "investments and resulting income . . . . upon trusts similar "in all respects to the trusts hereinbefore declared concerning "the accumulations and investments of the surplus income of "the husband's fund in the event of the wife surviving the "husband and marrying again at a time when there shall be "a child or children of the marriage surviving after payment "to the wife of the said sum of 150*l.* per annum And in "the like events . . . . the trustees shall after the expiration "of the said period of 21 years . . . . if and so long as the "wife and any child or children of the . . . . marriage shall "be living hold the dividends in respect of the said shares ". . . . exceeding 7 per cent. on the nominal value of such "shares in any one year upon trust to pay and distribute the "same equally between the wife and the then surviving children "or child of the . . . . marriage."

By a private Act passed in 1914 the capital of the company, whose shares formed part of the husband's fund, was increased to 1,200,000 shares of 1*l.* each, and every holder of any of the shares of 100*l.* each became entitled to receive 150 new 1*l.* shares for every one of the 100*l.* shares held. Trustees and all other holders in any fiduciary capacity of existing shares were authorized by the Act to accept and hold the new shares, and such shares were to be held in the same rights on the same trusts and subject to the same powers, provisions, charges and liabilities as those on and subject to which the existing shares in respect of which the new shares were issued were held immediately before the commencement of the Act, and so as to give effect to any instrument disposing of or affecting the existing shares. The trustees thus acquired 15,000 1*l.* shares in the reconstructed company. In 1918 they received 6,950 and in 1927 10,975 bonus shares, their total holding thus becoming 32,925 1*l.* shares. In 1938 the share capital was converted into stock, and the trustees became, and at the date of this summons were, holders of 32,925*l.* ordinary stock in lieu of the shares. Dividends in excess of seven per cent. were declared and paid on the ordinary stock for 1942, 1943 and 1944. On February 1, 1944, the husband died, leaving children. The wife did not marry again. By this summons, issued on September 29, 1944, three of the trustees asked how much of the £32,925 was, on the true construction of the settlement, subject to the direction for accumulation of income contained in cl. 4 thereof.

C. Rawlence for the plaintiffs.

Pascoe Hayward for the widow. The proviso for accumulation of the dividends on the shares applies to the 15,000*l.* worth of ordinary stock in the trustees' hands which represents the 15,000 shares which they received under the private Act in lieu of the 100 shares of 100*l.* each. The private Act itself makes that quite clear, although, but for that Act, the proviso probably would not have applied even to them, but would have been limited to the original 100 shares. Any dividends declared on those shares, or on ordinary stock representing them, in excess of seven per cent. must, therefore, be accumulated as the proviso directs. The proviso does not, however, apply to the 17,925 bonus shares, and so cannot now apply to the stock representing them. What the husband envisaged in the second proviso has in fact happened. He has predeceased his wife, leaving children, and she has not married again. It is only in that case that the dividends on the shares are to be accumulated, and, even so, only those or the original 100 shares of 100*l.* each or, now, on the ordinary stock representing them. Had those shares been sold and other investments bought instead of them, as there was power to do, the proviso could not have caught those other investments.

Wilfrid Hunt for the children. The proviso applies to all the stock now held by the trustees. The bonus shares are an accretion to the original 100*l.* shares, and so subject to everything affecting them. In the event of an appointment under the settlement giving, after the death of those entitled to income, the shares to one named person and the rest of the husband's fund to another, the appointee of the shares would also receive the bonus shares. It therefore follows that the bonus shares are merged in the original shares, go the same way, and are subject to the same incidents. *In re Speir* (1). There is nothing unfair in that, for it does not mean that the trustees' holding under the settlement will be increased. Their holding will still be in the same proportion as it was, and all that is increased is the nominal value of the shares held. *In re Whitfield* (2).

Romer J. Mr. Hayward, for the widow, concedes that the proviso applies to the 15,000*l.* stock which represents the original shares and that, therefore, any dividends on that stock in excess of seven per cent. must be accumulated as it directs. He contends, however, that it does not apply to the two issues of bonus shares or to the stock representing them. His argument is as follows. The first proviso directs that, if the wife re-marries, all the income shall be accumulated subject to her receiving 150*l.* a year out of the husband's fund. The husband, when dealing with the contingency which has in fact happened—namely, her not re-marrying—was at pains to choose from the husband's fund one asset only as the subject-matter of accumulation, namely, the shares, which are the original 100 shares only. Had those shares been sold and other investments bought instead of them, the proviso would not have applied to those other investments. But for the private Act it might not have applied even to the 15,000 shares representing the original 100 shares, and it can apply now only to investments directly representing those shares,

(1) [1924] 1 Ch. 359.

(2) [1920] W. N. 256.

namely, 15,000*l.* of stock. Mr. Hunt, for the children, argues that the proviso applies to all the stock in the trustees' hands, representing the original shares and the bonus shares. The bonus shares are an accretion for all purposes to the original 100 shares. Had an appointment under the settlement diverted, after the death of the income beneficiaries, the shares to one person and the rest of the husband's fund to another, undoubtedly the appointee of the shares, and no-one else, would receive the bonus shares which, therefore, are merged in the original shares, have the same destination, and are subject to the same incidents as the original shares. That view was apparently taken by Warrington L.J. in *In re Speir* (1), which Mr. Hunt cited. In that case 300 ordinary shares were bequeathed on trust to pay dividends, bonuses, and income to spouses for their joint lives and to the survivor of them for life and then on trust for an infirmary absolutely. Bonus shares were issued and a due proportion of them allotted to the trustees of the will, who treated them as capital. Later, one spouse died. On a summons to determine whether the bonus shares ought to have been transferred to the spouses as tenants for life or had been rightly treated as capital subject to the trusts of the will, P. O. Lawrence J. held that, on the true construction of the bequest, the tenants for life were entitled to them, but the Court of Appeal held that they had been properly treated as capital. Warrington L.J. said : (2) " . . . . I think that is quite clear, or at any rate it is made " more clear by the reference to the income of any new " investments being applied in the same manner as the income " of the shares to the tenant for life. Accordingly I think the " ordinary rule applies and the additional shares must be " capitalized and regarded as an accretion to the 300 original " shares." That view is, I think, correct, if I may respectfully say so, and, in the present case, the bonus shares must logically be an accretion for all relevant purposes to the original shares. I think also that I can reasonably take the view that the husband intended that dividends exceeding seven per cent. on the nominal value of the shares in any one year should be capitalized for the benefit of those interested in or entitled to the corpus.

Further, although bonus shares were issued, the trustees, holding was not increased, because they still held the same proportion : *In re Whitfield* (3). In that case Sargant J. said

(1) [1924] 1 Ch. 359.
(2) Ibid. p. 370.
(3) [1920] W. N. 256.

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that the trustees had not increased their holding because they still held the same proportion of the company's shares, and that all that had happened was that the nominal value of their shareholding had been increased. Therefore, in the present case, the fact that bonus shares have been issued will not cause a greater accumulation of dividends, even if I hold that the proviso for accumulation does apply to the bonus shares. Probably there will be less accumulation than there would have been had no bonus shares been issued.

On the true construction of the settlement, and having regard to the judgment of Warrington L.J. in *In re Speir* (1), and that of Sargant J. in *In re Whitfield* (2), I hold that the parties to the settlement intended the proviso for accumulation to apply to bonus shares, that it did apply to them and therefore now applies to the whole of the stock in the hands of the trustees. The costs of all parties to the summons, as between solicitor and client, will be paid out of the husband's fund.

Solicitors: *Taylor, Jelf & Co., for Randolph Eddowes & Co., Derby; Thicknesse & Hull.*

(1) [1924] 1 Ch. 359, 370. (2) [1920] W. N. 256.

K. R. A. H.

In re MARSHALL'S WILL TRUSTS.

COHEN J.

1945

Jan. 12;
Feb. 21.

Will—Trust—Appointment of judicial trustee by court—Trustee for purposes of Settled Land Act, 1925*—Judicial Trustees Act,* 1896 (59 & 60 *Vict. c.* 35)*, s.* 1*, sub-s.* 1.

Trustees for the purposes of the Settled Land Act, 1925, are trustees of a trust within the meaning of that word as used in s. 1, sub-s. 1, of the Judicial Trustees Act, 1896, and therefore the court has power to appoint the official solicitor, or any other judicial trustee, sole trustee for the purposes of the Settled Land Act, 1925.

ADJOURNED SUMMONS.

By his will, made in 1912, the testator George Marshall appointed F. Moss and J. Potter to be his executors and trustees, and devised and bequeathed the residue of his estate unto them in trust out of the income thereof to pay 1*l.* a week to his granddaughter therein named, and to pay or apply the balance of the income, or so much as they should think fit, for the comfort and benefit of the granddaughter, and to hold the residue, including any unexpended income, in trust for two charities. The testator died and the will was proved by both executors in 1913. F. Moss died before 1925 and J. Potter in 1925, having by his will appointed the respondent Amy Florence Potter his sole executrix, and she proved his will on June 16, 1925. The testator's granddaughter was a person under disability, and a receiver had been appointed of her estate under 53 Vict., c. 5.

The granddaughter now applied by the Official Solicitor as her next friend, under s. 1, sub-s. 1, of the Judicial Trustees Act, 1896 (1), that the Official Solicitor be appointed judicial trustee of the will of the testator and also judicial trustee for the purposes of the Settled Land Act, 1925, of the real property settled by the said will with consequential directions. A. F. Potter had been requested to appoint new trustees of the will, but had refused to do so. She was made a respondent to the summons but did not appear. The testator's estate included real property consisting of several freehold houses and one leasehold house in South London, the value of which could not be estimated at present, owing to war damage.

W. F. Waite for the applicant. This application is made because of a difficulty with the Official Solicitor, who will not accept the position of an ordinary trustee under this will. The question is whether there is power in the court to appoint him judicial trustee not only of the will, but for the purpose of the Settled Land Act, 1925. The respondent will not appear, but says she has no objection to the proposed appointment. The testator's will created a settlement, but without a tenant for life, so that all the powers of a tenant for life must be exercised by trustees or a trustee for the purposes of the Settled Land Act, 1925. There is no doubt that the court, under the Judicial Trustees Act, 1896, can appoint the Official Solicitor trustee of a will. The Act does not extend to charities, but apart from that exception, s. 1 suggests that a judicial trustee can be appointed for any other purpose which is a "trust." It may be necessary to sell some of the testator's real estate, but no title can be made to it except under the Settled Land Act. In an unreported case before Farwell J., on November 25, 1940, he appointed the Official Solicitor judicial trustee for the purposes of the Act.

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(1) The Judicial Trustees Act, 1896 provides by s. 1, sub-s. 1: "Where application is made to "the court by or on behalf of the "person creating or intending to "create a trust, or by or on behalf "of a trustee or beneficiary, the "court may, in its discretion, "appoint a person (in this Act "called a judicial trustee) to be "a trustee of that trust, either "jointly with any other person, "or as sole trustee, and, if such "sufficient cause is shown in "place of all or any existing "trustees."

By sub-s. 3 an official of the court may be appointed judicial trustee.

Cur. adv. vult.

Feb. 21. COHEN J.: In my opinion, the court has power to make the appointment. [His Lordship then read s. 1, sub-s. 1, of the Judicial Trustees Act, 1896, and continued]: The Act contains no definition of "trust" and I must therefore give to that word its ordinary meaning. For the purposes of this case I think that I can take the definition in Underhill on Trusts, 8th ed., p. 3, which reads as follows: "A trust is an "equitable obligation, binding a person (who is called "a trustee) to deal with property over which he has control "(which is called the trust property) for the benefit of persons "(who are called the beneficiaries or cestuis que trusts), of "whom he may himself be one, and any one of whom may "enforce the obligation." In my opinion, Settled Land Act trustees are trustees of a trust within that definition. The land is not vested in them, but capital money must be paid to them and they hold the investments representing capital money in trust for the persons who are entitled under the settlement. Moreover, they have certain other definite duties and powers. For instance, their consent is required in some cases to the sale of the mansion house or to the cutting of timber or to the compromise of disputes. In giving such consents the Settled Land Act trustees are clearly under the equitable obligation to do so for the benefit of the persons entitled under the settlement or in connexion with the statutory provisions.

I need not go into the facts of the present case. It is sufficient to say, first, that under the will there is no tenant for life, with the result that under s. 23 of the Settled Land Act, 1929, the trustees for the purposes of that Act have the powers of a tenant for life and, secondly, that this, in my opinion, is a proper case for the appointment of the Official Solicitor as trustee.

The form of the order will require some consideration. If I appoint the Official Solicitor judicial trustee of the will, the effect, having regard to the terms of the will and to s. 30 of the Settled Land Act, 1925, will be to make the Official Solicitor automatically a trustee, though not a judicial trustee, of the settlement. The Official Solicitor is anxious that he should be a judicial trustee of the settlement, that is to say, for the purposes of the Settled Land Act. In the circumstances of the case before me, he is, in my opinion, justified in this desire. I think that the way to achieve that result is that I should appoint him to be a trustee, first of all, for the purposes of the Settled Land Act, 1925, of the freehold and leasehold properties, specified in the schedule to the summons being properties forming part of the testator's estate, and direct that in that capacity he shall be a judicial trustee, and then go on to appoint him also a judicial trustee of the will.

Solicitor : *The Official Solicitor.*

H. L. L.

VAISEY J.
1945
Feb. 12.

In re EVERTITE LOCKNUTS, LIMITED.

Company—Acquisition by one company of shares in another—Approval by holders of shares exceeding nine-tenths of capital value—Objection by dissenting shareholder—Right of transferee company to acquire shares—Onus of proof that scheme is unfair or agreed price inadequate —Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 155.

Where a scheme or contract for the transfer of shares in one company to another company has within four months after the making of the offer been approved by the holders of not less than nine-tenths in value of the shares affected, and the transferee company gives notice to any dissenting shareholder that it desires to acquire his shares, it is entitled and bound to acquire those shares, unless the dissenting shareholder, within one month, makes an application to the court under s. 155 of the Companies Act, 1929, and affirmatively establishes that in spite of the majority in favour of accepting the offer the scheme is unfair, or the price offered for the shares is inadequate.

In re Hoare & Co., Ld. (1934) 150 L. T. 374 applied and followed.

ADJOURNED SUMMONS.

Evertite Locknuts (1938), Ld., was a company with a share capital of 20,000*l.*, divided into ordinary shares of a nominal value of 1*s*., and a smaller number of preference shares of 5*s*. each. It owned certain patent rights for the manufacture of nuts and bolts, which were being worked by Nuts & Bolts (Darlaston), Ld., a company the bulk of the share capital of which was held by Evertite Locknuts (1938), Ld. An offer had been made to the directors of Evertite Locknuts (1938), Ld., by Rubery, Owen & Co., Ld., to purchase the whole of its share capital at the price of 1*s*. 3*d*. for each 1*s*. ordinary share, and 6*s*. 3*d*. for each 5*s*. preference share. The offer was submitted to the shareholders, and the holders of over ninety-four per cent. in value of the ordinary shares, and of all the preference shares, approved of it. The applicant B. N. Prangley was the holder of ordinary shares in the company of the nominal value of 28*l*. in all. He refused to accept the offer and took out this summons under s. 155 of the Companies Act, 1929, asking for an order that he should not be bound to sell his shares to Rubery, Owen & Co., Ld., at the offered price.

C. L. Fawell for the applicant. The power of expropriation under s. 155 of the Companies Act, 1929 (1), ought not to be exercised in the circumstances. The applicant has no information to show whether this is a fair and reasonable offer or not. He has asked the directors of the transferor company, but they have refused to give him certain information, in particular as to the value of the patent rights of the transferor company, which are worked under licence by Nuts & Bolts (Darlaston), Ld., a subsidiary company, most of the capital of which is held by the transferor company.

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(1) Companies Act, 1929, s. 155: "Where a scheme or contract "involving the transfer of shares "or any class of shares in a com-"pany (in this section referred to "as 'the transferor company') to "another company . . . . (in this "section referred to as 'the "'transferee company'), has "within four months after the "making of the offer . . . . by "the transferee company been "approved by the holders of not "less than nine-tenths in value of "the shares affected, the trans-"feree company may, at any time "within two months after the "expiration of the said four "months, give notice in the "prescribed manner to any dis-"senting shareholder that it de-"sires to acquire his shares, and "where such a notice is given the "transferee company shall, unless "on an application made by the "dissenting shareholder within "one month from the date on "which the notice was given the "court thinks fit to order other-"wise, be entitled and bound to "acquire those shares on the "terms on which under the scheme "or contract the shares of the "approving shareholders are to be "transferred to the transferee "company."

Cecil Turner for the respondents, the transferee company. The applicant has not discharged the onus which lies on him of proving that the offer to purchase his shares is not a perfectly fair one. The directors of Evertite Locknuts (1938), Ld., have given their reasons for accepting the offer of Rubery, Owen & Co., Ld. It is contrary to the policy of s. 155 that the holder of only ·014 per cent. of the capital of a company should be in a position to stand out, and put the company to great trouble and expense. The offer to purchase these shares was a generous one and was at once accepted by over ninety-four per cent. of the shareholders. The only opposition is that of the applicant.

VAISEY J. This is an application under s. 155 of the Companies Act, 1929. That section, which I believe appeared in that Act for the first time—that is to say, it is not a re-enactment of anything which appeared in any earlier statute—is of a somewhat curious character, and it will be observed that it gives no indication of the grounds on which the court should intervene and make an order preventing the transferee company from acquiring the shares of a dissenting shareholder. But, fortunately, the section has already been considered by Maugham J., as he then was, in *In re Hoare & Co., Ld.* (1). That learned judge considered the terms of the section in relation to the facts of the case then before him. I think his decision is accurately summed up in the headnote, which says it was held " that where not less than nine-tenths of the shareholders " in the transferor company approve a scheme . . . . prima " facie the offer must be taken to be a fair one, and that " the court will not ' order otherwise '," so as to prevent what is described, with more or less accuracy, as the expropriation of the dissenting shareholder's shares, unless it is affirmatively established, in the face of the apparent views of the large majority of the shareholders, that the scheme is in point of fact unfair.

In his judgment, Maugham J. said : " I think it is manifest " that the reasons for inducing the court to ' order otherwise ' " are reasons which must be supplied by the dissentients " who take the step of making an application to the court, and " that the onus is on them of giving a reason why their shares " should not be acquired by the transferee company." After criticizing the use of the word " expropriation " as being not altogether apt to the circumstances of that case, the learned judge went on to say that without expressing a final opinion on the matter, because there might be special circumstances in special cases, he could not see that he had any right "to order otherwise" in such a case as he had before him, unless it was affirmatively established that, notwithstanding the views of a very large majority of the shareholders, the scheme was unfair. In that particular case, where the dissentient shareholders represented ·14 per cent. of the share capital, he directed that the transferee company should pay the costs of the dissenting shareholders, who failed in their application, and he also allowed them certain interest, which he described as "a small solatium" appropriate in the circumstances.

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(1) (1934) 150 L. T. 374.

In the present case the dissenting shareholder, who makes this application, does so in respect of a holding of shares of the nominal value of 28*l.* while the shareholders who, either originally or subsequently, have become bound to transfer their holdings, hold shares of a nominal value of over 19,850*l.*, those being the figures relating, I think, only to the ordinary shares. The preference shareholders, also affected by the proposal, have agreed, I think with unanimity, to accept the offer. The applicant does not say, and does not attempt to say, that the offer of 1*s.* 3*d.* for each 1*s.* share, which is made to him in common with the rest of the ordinary shareholders is an unfair offer, or an inadequate price. What he says is that at the time when the offer was made, and when he was called on to consider whether or not he should accept it, he was without sufficient, or perhaps without any, information as to certain relevant facts on which he could have based his conclusion one way or the other. That grievance or complaint is obviously one which he cannot urge against the respondents to the present summons, who are not the transferor company under the section, but the transferee company. It may be that he could, by appropriate proceedings against the transferor company, have compelled a disclosure of documents or other information sufficient to satisfy him, or, at any rate, which would be regarded by the court as sufficient to satisfy him. I am bound to say that I think the information which he received was a little meagre. The point was that the transferor company, the name of which is Evertite Locknuts (1938), Ld., had as its principal asset a large holding of shares in another company, known as Nuts & Bolts (Darlaston), Ld. What the applicant says is that the directors of the transferor company withheld from him information in their possession, or under their control, with regard to the position or prospects of Nuts & Bolts (Darlaston), Ld.

I have really no materials before me which will enable me to say either that any information with regard to that company was withheld, or whether, if so, it was withheld improperly. The difficulty I feel is that, if once it is conceded that a scheme of this kind can be upset merely for the reason that a shareholder is not given all the information which he might require or might expect from the directors of the transferor company, there would be no limit to the inquiry which would have to be set on foot as to the extent to which his demands for disclosure ought to be conceded. It is, of course, possible that the present applicant has some grievance against the directors of Evertite Locknuts (1938), Ld., but I am quite satisfied in my own mind that I should be going much further than Maugham J. was prepared to go in *In re Hoare & Co., Ld.* (1), if I said that it was not necessary for a dissentient shareholder, making an application under the Act, to establish unfairness, but that it would suffice if he merely said that he regarded himself as, or was in fact, unprovided with all the materials on which he could come to a just conclusion in regard to the acceptance or rejection of the offer.

Following as I do, the principle of *In re Hoare & Co., Ld.* (1), and applying it as best I can to the somewhat different circumstances of the present case, I do not see how I can listen to the plea of the applicant, who refuses to tell me whether he regards the offer as fair or unfair, but merely asks the court to say that he is not bound, because he might have had more information than in fact was offered to him as to circumstances which were, or might have been, relevant when he was considering the terms of the offer which he had received. I should like to adopt Maugham J.'s expression of sympathy with the small shareholder who feels aggrieved at being overborne by the overwhelming numbers of his fellow shareholders. I think that the court should always be ready to consider the objections of those who may be prejudiced, or may feel that they are being prejudiced, by the very drastic terms of the section. At the same time, it seems to me that if I were to accede to this present application, the whole matter would be left in a condition of quite intolerable uncertainty, and that it cannot be right that one shareholder, owning one-seven-hundredth part of the shares affected, should be entitled to stand out against the decision of the 699/700ths of the share capital, merely because he has, as he thinks, been left somewhat in the dark in regard to the material facts.

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(1) 150 L. T. 374.

I must refuse the relief for which the applicant asks. As regards the costs of the application, this is not, in my judgment, a case in which I could follow the precedent of the case before Maugham J. by ordering the transferee company to pay the applicant's costs. I think that justice will be done if I dismiss the application and make no order as to the costs of it.

Solicitors: *Routh, Stacey, Hancock & Willis, for Maslen & Maslen, Bournemouth*; *Bristows, Cooke & Carpmael.*

H. L. L.

LEWIN *v.* AMERICAN AND COLONIAL DISTRIBUTORS, LIMITED.

VAISEY J.
1945
Jan. 17, 18.

C. A.
1945
Mar. 12.

Scott and Morton L.JJ., Cohen J.

Landlord and tenant—Lease—User as licensed victualling house—Lessees' covenant that named person should not be concerned in the business carried on on premises—Assignment of reversion—Assignment of lease—Breach of covenant—Covenant running with the land.

In a lease, to which a company was third party as surety, of premises for use as a licensed victualling house, the lessee covenanted, inter alia, that S. should not be concerned in the conduct of the business carried on on the demised premises. The lessee assigned the lease to the company and the lessor assigned the reversion to L. S. in fact owned stocks of liquor which were kept on the demised premises, and was constantly thereon and giving orders to the employees. There was a clause for re-entry and determination of the lease on breach of covenant:—

Held, that the covenant was a covenant running with the land as touching and concerning the thing demised, and, accordingly, having been broken, the lease was forfeited and L. was entitled to possession of the demised premises.

WITNESS ACTION.

By a lease dated November 30, 1942, and made between Barclays Nominees (Branches), Ld. ("the lessor") which expression was to include the reversioner immediately expectant on the term, of the first part, Lucien Rene Samett, the lessee, which expression was to include his successors in title, of the second part, and American and Colonial Distributors, Ld., the defendant company ("the surety") of the third part, the lessor demised to the lessee Romano's Restaurant, Strand, London, for seven years at a rent of 2,000*l*. a year. The lease showed that the parties contemplated that the lessee should carry on Romano's as a licensed victualling house. Clause 2 was: "The lessee for himself and his assigns hereby covenants "with the lessor as follows . . . . (13.) that S. R. Sequerra ". . . . shall not . . . . have any interest in this lease or "in any company or firm interested in this lease and in "particular but without prejudice to the generality of this "clause that the said S. R. Sequerra (*a*) shall not be either "nominally or beneficially entitled to or interested in any "shareholding or loan capital of American and Colonial "Distributors, Ld., (*b*) that the said S. R. Sequerra shall "not be . . . . concerned in the conduct of the business of "American and Colonial Distributors, Ld., (*c*) that the said "S. R. Sequerra shall not be . . . . concerned in the conduct "of the business carried on upon the demised premises, "(*d*) that the said S. R. Sequerra shall not become an assignee "or sublessee of the demised premises or any part thereof." Clause 3, sub-cl. 1, contained the defendant company's covenant, as surety, with the lessor that the lessee should pay the rent and observe the lessee's covenants and that the defendant company would on demand pay and make good to the lessor all losses damages costs and expenses sustained or incurred by the lessor by reason or in consequence of any default by the lessee. Sub-clause 2 provided that if the lessee should become bankrupt during the term and the trustee in bankruptcy should disclaim the lease, the surety would accept a lease of the premises similar to the lease. Clause 5, sub-cl. 1, provided, inter alia, that, if any covenant should not be performed or observed, it should be lawful for the lessor at any time thereafter upon the demised premises or any part thereof in the name of the whole to re-enter and that thereupon the demise should absolutely determine. On January 30, 1943, with the lessor's consent in writing the lessee assigned the lease to the surety, the defendant company. On September 25, 1943, the lessor assigned the reversion to the plaintiff. Mr. Sequerra in fact owned large stocks of liquor which were kept on the demised premises and sold in that part of Romano's restaurant which was open to the public. Also, he was constantly at the restaurant giving orders to employees of the defendant company. In a written agreement dated July 9, 1943, in which he was described as the owner of the restaurant, he agreed to employ a named person as manager at a stated salary, and he held shares in the defendant company and had lent to it substantial sums to enable it to open and manage the restaurant. On July 13, 1943, and January 24, 1944, notices were given to the defendant company of the breaches of covenant and requiring it to remedy them. The defendant company contended that the above covenant by the lessee did not run with the land and premises the subject matter of the lease, being collateral only thereto, and therefore that it was not binding on the defendant company as assignee thereof. The plaintiff claimed a declaration that the lease had been forfeited to him for breach of the covenants, and possession of the premises and damages and costs, and the defendant company counterclaimed, if it should be held that the covenant was binding on it, for relief against forfeiture under s. 146, sub-s. 2, of the Law of Property Act, 1925, on such terms as the court should think fit.

Harman K.C. and *W. F. Waite* for the plaintiff. It is true, that the whole object of this covenant is to prevent Sequerra from doing certain things, but it most emphatically touches and concerns the demised premises, for it was wholly for the protection of the owner from time to time of those premises that it was entered into. Except that it is a covenant not to do certain things, it is, from that point of view, just like a lessee's covenant to do a certain thing, as, for example, to live on the premises, which has been held to be binding: *Tatem* v. *Chaplin* (1); or a covenant so to conduct demised premises as to ensure that the licence shall not be endangered: *Fleetwood* v. *Hull* (2); see also *Clegg* v. *Hands* (3). In *Barnes* v. *City of London Real Property Co.* (4) a covenant to maintain and pay a housekeeper for a block of flats was held to touch and concern the thing demised and to run with the land. All these authorities make it quite clear that the covenant in this case is enforceable against the defendant company. The fact that it is directed against Sequerra is quite irrelevant to its enforceability.

J. Neville Gray K.C. and *Geoffrey Lawrence* for the defendant

(1) (1793) 2 H. Bl. 133.
(2) (1889) 23 Q. B. D. 35.
(3) (1890) 44 Ch. D. 503.
(4) [1918] 2 Ch. 18.

company. The covenant is directed only to curbing the activities of Sequerra, and has nothing to do with the demised premises or the business carried on on them. It is not comparable with the covenant which was held to run with the land in *Fleetwood* v. *Hull* (1). Where a lease gave liberty to make a watercourse and build a mill, the lessee's covenant for himself and his assigns, not without a parish certificate to hire to work in the mill persons settled in other parishes, was held not to run with the land or bind his assignees: *Congleton* (*Mayor*) v. *Pattison* (2). This was a covenant not to be performed on the demised premises. Sequerra has neither to do, or not to do, anything whatever. All that has happened is that somebody else, namely, the lessee, has covenanted for himself and his assigns that Sequerra shall not be interested in the company, or its business, or in business carried on on the demised premises. That is not a covenant to be performed on the demised premises and is comparable to the covenant in *Dewar* v. *Goodman* (3).

Harman K.C. replied.

VAISEY J. stated the facts and continued: The law appears to stand thus: Notwithstanding the apparently unqualified form of a proviso for re-entry, of the character of the one found in the present lease, it is not possible for the assignee of a lessor to take advantage of a breach of covenant for the purposes of such a proviso unless the covenant is one which, in the technical phrase, runs with the land. That rule is very clearly seen in *Stevens* v. *Copp* (4). The headnote is: "A lease "contained a proviso for re-entry in case the lessee, his "executors, administrators, or assigns, or any tenant, under-"tenant, or occupier of the premises demised, should, at any "time during the term thereby granted, be lawfully convicted "of any offence against any of the present or future game laws. "The occupier of the premises having been convicted of "killing game without a game certificate, the assignee of the "reversion brought ejectment: *Held*, that he could not "maintain the action. Per Martin, Channell and "Cleasby BB.: that the assignee of the reversion could not "avail himself of the breach of the condition, inasmuch as the "condition did not touch or concern the land demised, and "therefore did not run with the land." The same matter

(1) (1889) 23 Q. B. D. 35.
(2) (1808) 10 East 130.
(3) [1909] A. C. 72.
(4) (1868) L. R. 4 Ex. 20.

was dealt with by Lord Russell of Killowen in *Horsey Estate, Ld.* v. *Steiger* (1). That was a case not of a covenant but of a condition of the lessee's bankruptcy, but I think that, to make the matter clear, I should read a short passage from the judgment of the Lord Chief Justice. He says: "The third "point, which presents the greatest difficulty, has therefore "to be considered—namely, is this condition of re-entry in "the event of the company entering into liquidation one which, "in the language of the common law, 'runs with the land'? "It is to be noted that this question was not raised in the court "below, and the judgment of the learned judge is silent upon "it. It was put in argument that the question here turned "upon a condition and not upon a covenant, and it was "suggested that the cases dealing with covenants were therefore "not authorities on the present question. I cannot assent "to this view. Whether a particular covenant or condition "does or does not run with the land is determined by the "common law, and it is enough to say that the authorities "uniformly treat them as governed by the same principles." Then he refers to *Stevens* v. *Copp* (2) and continues: "Further, "the statute 32 Hen. 8, c. 34, s. 1, which gives assignees of "the reversion the same benefit and remedies as lessors or "grantors in respect of covenants and conditions, couples "them together, and s. 2 of that Act, which gives lessees the "same remedies against assignees of the reversion which they "had against the lessor or grantor, in like manner couples "conditions and covenants together. Is, then, the condition "in question one the burden of which runs with the land so "that its obligation binds the assignee of the lease? The "answer to this question depends, in this case, upon whether "it is a condition touching the thing demised or is merely "collateral. I say 'in this case' because there are undoubtedly collateral covenants or conditions, which on "equitable principles, but only in a restrictive sense, bind "the assignee. But this principle is confined to covenants "and conditions of a negative character, and depends upon "notice. But apart from cases of this class the true principle "is that no covenant or condition which affects merely the "person, and which does not affect the nature, quality, or "value of the thing demised or the mode of using or enjoying "the thing demised, runs with the land: see *Congleton* "*(Mayor)* v. *Pattison* (3). Does, then, the condition or proviso

(1) [1899] 2 Q. B. 79, 88. (2) (1868) L. R. 4 Ex. 20.
(3) (1808) 10 East 130.

"in question 'run with the land'? On the whole, and after "much hesitation, I have arrived at the conclusion that it "does. It must be taken as fully established that a covenant "against assignment and also a proviso for re-entry in the "case of bankruptcy run with the land," and he refers to a number of cases and continues: "I think that a proviso for "re-entry in case of liquidation by a company or an individual "falls within the principle of these cases, and indeed that the "proviso as to liquidation is cognate both to a covenant against "assignment and to a proviso relating to bankruptcy. It "partakes of the character of each of them. The proviso "against bankruptcy was introduced into leases in consequence of the ordinary covenant against assignment being "held not to apply to the involuntary assignment which is "the consequence of bankruptcy: see *Doe d. Lloyd* v. "*Ingleby* (1): and, like the covenant against assignment, it "touches the question who shall have and occupy the premises "demised, and therefore touches and concerns the thing "demised. . . . . I find myself unable to draw any "distinction in principle between these cases and the case of "a proviso for re-entry in case the assign of the lessee should "enter into liquidation. I think the result, that covenants "against assignment and provisoes for re-entry in the event of "bankruptcy or liquidation stand on the same footing, is "made clearer by considering what are the consequences "following from a company entering into liquidation." I need not read the rest of that judgment.

Those two cases, namely, *Horsey Estate, Ld.* v. *Steiger* (2) and *Stevens* v. *Copp* (3) are mentioned in Woodfall on Landlord and Tenant, 24th ed., at p. 559, where the law is stated in these words: "A condition for re-entry in case the lessee or "his assigns become bankrupt runs with the land, but a "condition for re-entry in case the lessee or his assigns be "convicted of any offence against the game laws does not; "it has been said that the running of conditions with the land "is governed by exactly the same rules as the running of "covenants with the land." Also, in Foa's Law of Landlord and Tenant, 6th ed., at p. 469, the same two cases are cited with this note: "This would seem to entail the somewhat "curious result that the interest taken by the assignee . . . . "is less precarious than that of the lessee; for the latter

(1) (1846) 15 M. & W. 465.
(2) [1899] 2 Q. B. 79.
(3) L. R. 4 Ex. 20.

" of course . . . . may be made liable to forfeiture on breach " of covenant of *any* kind." Therefore the condition of re-entry in this lease appears, according to the law as I understand it, to run with the land only in so far as the covenants are of the character which run with the land.

I now approach the question whether in this case the covenant, a breach of which has been not only alleged but admitted, is a covenant of that description or not. Both Mr. Harman and Mr. Gray are agreed in submitting that the object and purpose of the covenant is not a matter of speculation, but that I must read it as part of the document as a whole, knowing nothing more than what appears in the document itself. It seems to me that the numerous references to using the demised premises as a licensed victualling house and not for any other purpose, and the various provisions as to licences and so forth, which appear in the various parts of the lease, make it perfectly plain that this was not merely a lease of so much of land and so much of bricks and mortar, but that it was a lease of business premises, and business premises of that very special kind which possess attaching to them a sort of goodwill which it is the duty of the lessee, if he complies with the terms of the lease, to maintain to its full value for the benefit of the lessor when the lease comes to an end. Licences, for instance, have to be maintained, so that at the termination of the lease the landlord is to come into the benefit of them. Quite clearly, if the licences were forfeited, the premises would thereby become of less value. Therefore I read this covenant, expressed as it is in this curious impersonal manner, not as obliging the lessee to do anything, but positively enacting certain restrictions in relation to Sequerra. I must read that in connexion with the rest of the document. Sequerra is, according to this covenant, not to have any interest in the lease. The lessee covenants that he shall not have any interest in the lease either directly or indirectly and shall not have any interest in any company or firm interested in the lease. Those are rather vague expressions. A lease may be regarded from various points of view. It may be regarded as a piece of paper, as a lease and counterpart, or a piece of parchment, or it may be regarded merely as the label or compendious evidence of title for the property which it includes. I should be inclined to read the expression " have any interest in " the lease as really meaning have any interest in the demised premises, because I cannot see very

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much sense, if any (and I cannot attribute nonsense to the parties) in treating the lease as being merely a piece of paper or parchment. I think that the same construction must be applied when we have references to " company or firm " interested in " the lease. I see very little difference between that expression, read, as I think, sensibly, and " interested " in the demised premises." The matter does not, however, stop there, because the covenant goes on to particularize, and one of the particulars, and the one which seems to me to be the relevant one here, is the restriction which says " that the " said Sequerra shall not be in any way concerned with the " conduct of business carried on upon the demised premises." What business? Obviously, the business of a licensed victualler, which is the only business which is permitted and which is not only the only business which is permitted but a business which it is the positive obligation of the lessee to carry on and maintain in the proper manner.

It seems to me, therefore, that this covenant is not very different from saying that the business shall be carried on upon the demised premises in a proper manner, but subject to this, that those who are to be concerned in its being carried on are not to include Sequerra himself. Quite obviously, if so read, this is an obligation not requiring something to be done on the demised premises but prohibiting the doing of something thereon. It directly relates to the demised premises, to the use of them, and to the manner in which the lessee is to enjoy them. It has nothing to do with anything which takes place outside the four walls of Romano's Restaurant, although it was argued (and I do not wish to ignore the argument) that it might be possible for Sequerra to do something in the way of conducting the business, without going on the property at all. That seems to me to be approaching rather perilously near to a quibble, because, although it might be a possible thing, it is a very unlikely thing that a man should conduct a business or be concerned in the conduct of it elsewhere than at the premises on which it is carried on. I so read that covenant. It seems to me, first, to relate to something which is not to be done on the demised premises; that is to say, it prohibits the doing of something on them. It is nothing to do with any other land or premises, and is a restriction governing the preceding provisions of the lease relating to the user of the property, the maintenance of the licences, and the other matters with regard to which the lessee has bound himself.

If that be the meaning of this covenant, I look at the authorities to solve the question whether it touches or concerns the demised premises. I will refer, first, to a very old case, which has been cited with approval in the later ones, namely, *Tatem* v. *Chaplin* (1). The headnote is: "A covenant in "a lease that the lessee, his executors and administrators, "shall constantly reside upon the demised premises during "the demise, is binding on the assignee of the lessee, though "he be not named." I take it from that that it would clearly follow that a covenant by the lessee that he should not reside on the demised premises would equally touch and concern the demised premises and would run with them in the same way that the positive covenant to reside on them would run. The next case in the same line of authorities is the case of *Fleetwood* v. *Hull* (2), a decision of Charles J. There the covenant was by the lessee of a public house to conduct and manage the business of an inn in such proper and orderly manner as to afford no ground or pretext whatever whereby the licences might be suspended or forfeited. The learned judge, after reviewing earlier authorities and saying that that covenant was concerned with the mode in which the premises are to be dealt with and used by the occupier, cites the earlier cases, including *Tatem* v. *Chaplin* (1) and *Thomas* v. *Hayward* (3) which I shall mention presently, where, as the learned judge says (4): "the lessor of a beerhouse had "covenanted with the lessee not to build or keep any house for "the sale of spirits or beer within half a mile of the demised "premises, and it was held that this covenant did not run "with the land." "But," says Charles J. (5): "that was "upon the ground that the covenant was not either to do or "refrain from doing anything on the demised premises. It did "not touch the thing itself; it only restrained the lessor from "setting up a beerhouse somewhere else." I take that statement in the judgment of the learned judge to imply that, in his opinion, if the covenant had been to do or to refrain from doing something on the demised premises, it would have run with the land.

The next case is the very well known one of *Clegg* v. *Hands* (6). There there was a covenant by the lessee that he would not during the term, directly or indirectly, buy, sell

(1) 2 H. Bl. 133.
(2) 23 Q. B. D. 35.
(3) (1869) L. R. 4 Ex. 311.
(4) 23 Q. B. D. 37.
(5) Ibid. 38.
(6) 44 Ch. D. 503.

or dispose of on the premises any ales or stout other than such as had been bona fide purchased from the lessors. Among other things, it was held in that case, which, I think, is the first tied house case, that the covenant was not a personal covenant not capable of assignment, but a covenant relating to the way in which the business of a particular house was to be carried on, and accordingly, a covenant running with the land and enforceable by the owner of the reversion on the lease. Cotton L.J. said (1): " Then it is said that this " covenant does not run with the land. I think it does run " with the land. That is my opinion ; but there are other " points on which this case may be decided independently of " that question. It is a contract relating to the way in which " the business at a particular house is to be carried on—there- " fore it is a contract relating to the public house, just as much, " in my opinion, as a contract as to the mode in which the " cultivation of a particular bit of land is to be carried on " relates to the land. It affects the value of the reversion, " it affects the house, and in my opinion it is a contract running " with the land. If that is so, that will enable the judgment " to be supported "—the action was one in which an injunction was sought—" and will enable the present owner of the " reversion in this case to sue."

In *White* v. *Southend Hotel Company* (2) there was a covenant to buy wines from a particular wholesaler, and it was held that the assignee of the lessee was still bound by the covenant and entitled to the benefit of a certain proviso. Lindley L.J., in giving judgment in the case, using words of general import which I think it right to quote, said (3): " Questions of this " kind are always somewhat troublesome and difficult ; but, " having regard to the authorities to which our attention has " been called, and especially to such cases as *Tatem* v. " *Chaplin* (4), *Clegg* v. *Hands* (5) and *Fleetwood* v. *Hull* (6) " . . . . it appears to me that it is impossible to say that the " tenants' ' assign ' is not bound by this covenant. It is " a covenant restraining, in fact, the lessee and his assign " (although not named) from using this property in a particular " way. In the old language which we are accustomed to with " reference to matters of this kind, that is a covenant ' touching " ' the land.' I think that is plain, not only from what was " said by this court in *Clegg* v. *Hands* (5), where we had a

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(1) 44 Ch. D. 518.

(2) [1897] 1 Ch. 767.

(3) Ibid. 771.

(4) 2 H. Bl. 133.

(5) 44 Ch. D. 503.

(6) 23 Q. B. D. 35.

" somewhat different problem to solve, but also from the " decision of Charles J. in *Fleetwood* v. *Hull* (1), which contains " a very full and careful investigation of what is meant by the " expression 'touching the land.' It appears to me, on those " authorities, that this covenant touched the land, and that " consequently the defendants are bound by it." A similar view was taken by the other lords justices and that case seems to me to support the view which I have formed in this case. Lastly, on this line of cases, we have *Barnes* v. *City of London Real Property Company* (2) before Sargant J., where the covenant in question was to maintain and pay a housekeeper to assist the tenants of a large block of flats. Sargant J. held that the obligation as to the housekeeper was one with reference to the subject matter of the lease and would bind the reversionees.

Of the cases which were cited on the other side I may mention, first, *Congleton* (*Mayor*) v. *Pattison* (3), where there was a covenant not to hire persons from certain other parishes to work in a certain mill. That seems to me to be a very different case. So also was *Dewar* v. *Goodman* (4). The last of the cases on the other side is *In re Hunter's Lease* (5) before Uthwatt J.

I come to the conclusion that this covenant precluding Sequerra from concerning himself in this business of management is a covenant which runs with the land and touches and concerns the thing demised, exactly in the same way as the covenants which were referred to in the five cases which I have cited, beginning with *Tatem* v. *Chaplin* (6) and ending with *Barnes* v. *City of London Real Property Company* (2). Indeed, I cannot distinguish between them. I have disregarded, as I think I was bound to do, the utterly reckless manner in which this covenant has been ignored by the defendant company, which admits in the most perfectly candid manner that it has disregarded it entirely.

That leads me to my final point, as to which I need not, perhaps, express a concluded opinion, but, having regard to the amount of time taken in discussing it, I think that I ought not altogether to pass it over. It is this: The assignees of the lessee were alio intuitu parties to the deed itself. They did not, it is true, enter into a direct obligation in regard to the thirteen paragraphs of the covenant by which the lessee

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(1) 23 Q. B. D. 35.

(2) [1918] 2 Ch. 18.

(3) 10 East 130.

(4) [1909] A. C. 72.

(5) [1942] Ch. 124.

(6) 2 H. Bl. 133.

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was bound, but they did, by the third clause of the lease, admit that the demise had been made at the request of the defendant company and covenanted with the lessor, that is, with Barclays Nominees (Branches), Limited, that the lessee would perform the covenants. If the defendant company is bound by that covenant, I have felt a great deal of doubt whether it is not also bound by the fifth clause of the lease, and I think that a good deal might be said for the proposition that the defendant company has in sub-clause 1 of clause 5 of the lease bound itself to submit to re-entry on the breach of any covenant, whether running with the land or not, in the event, which has happened, of the defendant company itself becoming the lessee by assignment. If I am right on the first point, that the covenant runs with the land, the second point, I take it, is one which I need not decide, and I do not propose, therefore, to dwell on it at any length, but I wish to make it clear that even if the covenant were not one which ran with the land and, therefore, a covenant the breach of which by an ordinary assignee of the lease could not be taken advantage of, I am not at all convinced that the defendant company, which was actually a party to the lease, stands quite in the same advantageous position. The note in Foa's Landlord and Tenant, 6th ed., 469, which points out that this doctrine entails the somewhat curious result that an assignee's interest is less precarious than that of the original lessee, rather suggests to me that that advantage is not one which could be claimed by an assignee who happened, although, as I have said, alio intuitu, to be actually a party to the document; but, as I have said, it is unnecessary for me to decide that point, having regard to the view which I have taken of the main point. It is on that main point that I decide that the plaintiff's case is here well founded.

I shall therefore, make a declaration in the terms of the prayer to the statement of claim, and I shall make an order for possession: I shall award the appropriate sum of mesne profits by way of damages, and the plaintiff must have the costs of the action. The defendant company electing not to proceed with the counterclaim, it is dismissed with costs.

K. R. A. H.

The defendants appealed.

Gray K.C. and *Geoffrey Lawrence* for the defendants. This covenant does not run with the land, being merely personal and collateral, directed against Sequerra. It does not touch or concern the land. [SCOTT L.J. referred to *Cockson* v.

Cock (1).] It is admitted that there is no distinction in principle between that case and the present. Sub-clause 13 is much wider than one dealing with the management of the premises, and is much wider than is necessary for the protection of the lessors' business. Had it been limited to the prevention of Sequerra from managing the business it might have been more difficult to say that it did not run with the land. Sub-clause 13 (*c*) cannot be treated as a separate covenant; and the whole clause cannot be split up into different covenants. The fact that part of the covenant runs with the land does not admit of the construction that the whole does. Taken literally it would prevent Sequerra from holding a 100*l*. debenture in the defendant company, a fact which could not affect the management of the business. This covenant does not affect the nature, quality or value of these premises. *Congleton* (*Mayor*) v. *Pattison* (2). [*Clegg* v. *Hands* (3) was also referred to.]

Roxburgh K.C. and *W. F. Waite* for the plaintiff were not called upon to argue.

Scott L.J. stated the facts, and continued: In my opinion Vaisey J. was right in holding that the covenant in cl. 2, sub-cl. 13 (*c*), definitely does run with the land; for it requires that Sequerra shall not be concerned in any way in the conduct of the business and the premises where the business was to be carried on were licensed premises. It is said nevertheless that this covenant does not touch or concern the land. But it seems to me impossible to give any effect to sub-cl. (*c*) of cl. 3, except with reference to the licensed premises. Counsel for the defendants say that it cannot be separated from the rest of the clause, because if it is, it is too wide. I think on the contrary, that each clause constitutes a separate covenant, and if it does, cl. 3 (*c*) stands by itself as a covenant relating to land. The learned judge made a careful review of the cases bearing on the subject, and it is not necessary for me to review them again. The principle involved is, that where premises are let for the purpose of some business occupation, the way in which the premises are to be used is an essential feature, and, as the rent depends on that user, the covenant dealing with the user runs with the land. Several examples of this are reported in the case of tied houses. It is the same principle as was applied in *Cockson* v. *Cock* (1) where the covenant was to leave for

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(1) (1606) Cro. Jac. 125.

(2) 10 East 130.

(3) 44 Ch. D. 503.

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pasture fifteen acres of the land demised, and the covenant was broken by the ploughing them up by the assignee of the covenantor. It was held to run with the land because it was for the benefit of the estate " according to the nature " of the soil." There is no difference in principle between that covenant and one which affects the business carried on upon the land. A covenant that A. B. shall not be employed in the business to be conducted on the land seems to me necessarily to run with the land. The appeal must be dismissed.

Morton L.J. I should have been quite content to express my agreement with the judgment of Vaisey J., but I shall add a few words out of deference to Mr. Gray's argument. In my view there is one short ground upon which this appeal should be dismissed, apart from any other grounds which may exist. Reading sub-cl. 13 (*c*) of cl. 2 of the lease in conjunction with the opening words of the clause, one finds a covenant by the lessee in the following terms :—" The lessee for himself " and his assigns hereby covenants with the lessor that the " said Sequerra shall not be concerned in the conduct of the " business carried on upon the demised premises." Mr. Gray has sought to limit the meaning of this covenant by reference to certain earlier portions of sub-cl. 13, but to my mind it is a separate covenant of a perfectly plain meaning, and it is a covenant as to the persons by whom the business carried on on the demised premises is or is not to be conducted. There is no doubt that this covenant was broken by the defendant company, the assignee of the lease, and in my judgment there is no doubt that it is a covenant which runs with the land. This covenant falls exactly within the words of Cotton L.J. in *Clegg* v. *Hands* (1) : " It is a contract relating to the way " in which the business at a particular house is to be carried " on—therefore it is a contract relating to the public house, " just as much, in my opinion, as a contract as to the mode in " which the cultivation of a particular bit of land is to be " carried on relates to the land."

I agree that the appeal must be dismissed.

Cohen J. I agree.

Solicitors for plaintiff : *Preston, Lane-Claypon & O'Kelly for Herbert & Gowers & Co., Oxford.*

Solicitors for defendants : *Oxcar Mason & Co.*

(1) 44 Ch. D. 518.

W. L. L. B.

ATTORNEY-GENERAL *v.* DEAN AND CHAPTER OF RIPON CATHEDRAL.

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Feb. 13, 14, 15; *Mar.* 21

Ecclesiastical Law—Cathedral—Scheme—Statutes—Direction of services by Dean — "Full choral services" — Substitution of chants for musical settings to canticles—Action claiming declaratory order—Jurisdiction of High Court—Judicial discretion as to exercise of jurisdiction—Cathedrals Measure, 1931 (21 *&* 22 *Geo.* 5, *No.* 7), *s.* 3.

The statutes of a cathedral, contained in a scheme made under the Cathedrals Measures, 1931 and 1934, are, so far as they are concerned with the internal regulation of the cathedral and its services by the Dean and Chapter, part of the ecclesiastical law administered and enforced by the ecclesiastical courts alone.

Under the statutes made for Ripon cathedral in 1936 the regulation and direction of all the services to be held in the cathedral vested solely with the Dean, and there were to be "full choral "services" every Sunday morning and evening throughout the year. The Dean had instructed the organist that the Te Deum and other canticles at morning and evening prayer were to be sung by the choir to chants and not to musical settings. The plaintiff, at the relation of the Royal Society of Organists, brought this action, claiming that the direction of the Dean was a breach of the cathedral statutes, and for a declaration that morning and evening prayer were not "full choral services" unless the canticles were sung to musical settings in accordance with long-established cathedral traditions:—

Held, that the provisions relating to the services were a matter purely of ecclesiastical law, and proceedings for any breach of the statute could be taken in any ecclesiastical court; that it was doubtful whether the High Court had any jurisdiction to entertain the action, but, assuming that it had, such jurisdiction extended only to the making of a declaratory order interpreting the statutes, which it had no power to enforce by mandatory order, injunction or otherwise; that as any remedy must be sought in another jurisdiction, the court in its discretion would decline to make any such declaration; and that the fact that the action was brought by the Attorney-General either ex officio or at the instance of a relator, in the public interest, did not deprive the court of its usual discretion to refuse to make an order in such a case.

ACTION.

This action was brought by the plaintiff at the relation of the Royal College of Organists against the Dean and Chapter of Ripon Cathedral, claiming (1.) a declaration that on the true construction of the statutes of the cathedral the defendants were under a duty to maintain and hold full choral services in the cathedral every Sunday morning and evening throughout the year; (2.) that for the purposes of such declaration the service of morning prayer was not a full choral service unless the Te Deum or Benedicite was sung to a musical setting and not to a chant or chants, and the service of evening prayer was not a full choral service unless the Magnificat and the Nunc Dimittis (or the authorized alternatives therefor) were sung to musical settings and not to chants.

The plaintiff based his claim on a provision contained in the scheme relating to Ripon Cathedral made under the Cathedrals Measures, 1931 and 1934, which prescribed that there should be full choral services every Sunday morning and evening, and his complaint was that, by order of the defendants the canticles were now sung to chants and not to settings. The defendants did not accept the plaintiff's construction of the provision, and questioned the jurisdiction of the court to deal with the matter.

J. Neville Gray K.C. and *A. T. Macmillan* for the plaintiff. The question turns on the meaning of the words "full choral "service" in the Ripon Cathedral Statutes. There are two kinds of choral service, parish church and cathedral, and the statutes imply the difference between the two. Ripon Cathedral is not a parish church, though it has a parish attached to it. In a full choral service at a cathedral, the canticles at matins and evensong are always sung to settings, and not to chants. This practice has been departed from at Ripon, where the parochial church council, which has no powers in the matter, voted in favour of substituting chants for settings, and the Dean accepted that vote, which he had no right to do. If it is desired to have an extra service with simple music, there is no reason for not holding it, and the organist offered to hold it. But there is a regular traditional cathedral service, and the evidence shows that there is no doubt what that means. The statutes use the word "shall" and that is clearly mandatory and not merely directory. The action is properly brought by the Attorney-General as representing the people of the diocese, and the general public are interested: *Attorney-General* v. *Sharp* (1). Evidence of the technical meaning of the words "full choral service" is admissible to explain their meaning. *Shore* v. *Wilson* (2), *Unwin* v. *Hanson* (3).

G. O. Slade K.C. and *Tatham* for the defendants: It is submitted as a preliminary point that this court has no juris-

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(1) [1931] 1 Ch. 121. [1932] 1 Ch. 303.

(2) (1842) 9 Cl. & Fin. 355, 501, 502.

(3) [1891] 2 Q. B. 115.

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diction in this case. The Dean and Chapter alone have power to regulate the services in the cathedral, and when they are unanimous their decision is final. See Act of Uniformity Amendment Act, 1872, s. 3; Pluralities Act, 1838, s. 80. This is a parish church as well as a cathedral. Any dispute between the Dean and Chapter on any matter relating to the services is to be decided by the Bishop, and not by any court: clause 5 (3) of the Ripon Scheme. Secondly, assuming these to be public statutes, expert evidence is inadmissible to explain the language of ordinary English words in a statute: see *Marquis Camden* v. *Inland Revenue Commissioners* (1). It is for the court to determine the true interpretation of words in a statute as best it can and no evidence by an organist as to what "full choral service" means is admissible. The Attorney-General may intervene to protect the rights of the public, assuming the general public as such has a right to attend cathedral services: see *Attorney-General* v. *Sharp* (2), *Cole* v. *Police Constable* 443A (3). If, however, these cathedral statutes are not public statutes and evidence is admissible to interpret them, it is submitted that their language is directory and not imperative: see *Caldow* v. *Pixell* (4). That was a decision on the Ecclesiastical Dilapidations Act, 1871, s. 29, holding that it was directory, and not imperative. Similarly these cathedral statutes should be interpreted as directory: see Archbold's Criminal Pleadings, 31st ed., at p. 5. There are three possible meanings of the phrase "full choral service." It may mean (*a*) a service for which the full choir, i.e., six lay-clerks and twelve choristers, attends and takes part, or (*b*) choral and full services, i.e., choral matins, choral litany and choral communion, or (*c*) services at which every portion of the service which can be sung, is sung and not said. Whichever meaning is adopted, it does not come anywhere within the meaning contended for by the plaintiff. The phrase does not refer to any particular degree of musical elaboration in singing.

Neville Gray K.C. in reply. The statute is in the most mandatory form possible. In 1936 the Cathedral Commissioners considered what the words meant and altered them to mean what they intended them to mean. Unless the canticles are sung to settings, a cathedral service is not fully choral.

Cur. adv. vult.

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(1) [1914] 1 K. B. 641, 647.

(2) [1931] 1 Ch. 121.

(3) [1937] 1 K. B. 316.

(4) (1877) 2 C. P. D. 562, 566.

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Mar. 21. UTHWATT J. read a judgment in which after stating the facts as set out above he continued: By the Cathedrals Measure, 1931 (which was amended in immaterial respects by the Cathedrals Measure, 1934), there was set up a body of commissioners whose principal functions (s. 2) were (inter alia) to provide by means of schemes under the Measure for the establishment of constitutions and the making of statutes for cathedral churches. The commissioners were required (s. 9) to prepare schemes concerning the relation of bishops to their cathedral churches and these schemes were to provide that the bishop should be the visitor of the cathedral church belonging to his diocese, and were to define the powers and duties of the bishop as visitor. By s. 10, schemes were to be prepared containing such further statutes for cathedral churches and such other provisions as were required to enable the Measure to be carried into effect. Sub-section 2 set out in detail the subject matter to be included in schemes framed under this section. All the particular matters— some sixteen in number—referred to in this section, related in substance to matters of internal administration of the cathedral and its affairs except heads (xv.) and (xvi.) which were as follows:—the schemes shall " (xv.) contain " suitable directions in respect of the cathedral music and the " education of the choristers, and as to the duties of the " organist; (xvi.) contain such further and other directions " as shall be proper so as to enable this Measure so far as it " affects such cathedral church to be fully carried into effect." By s. 8 no scheme was to be approved by the commissioners without the consent of the consenting body as defined in the Measure (generally the Dean and Chapter) and the Bishop of the diocese. Section 5 (v.) provided that when a scheme has been duly confirmed " such scheme shall be effectual in " law as if contained in this Measure," so that a scheme duly confirmed had the force and effect of an Act of Parliament.

Among the schemes prepared and confirmed under this Measure is one relating to the cathedral church of Ripon. The Ripon scheme, as scheduled to the order in council confirming it, was described by the cathedral commissioners as being " the constitution and statutes we propose for the govern- " ment of the cathedral church of St. Peter and St. Wilfrid " at Ripon." The constitution is first set out. I need only refer to two provisions. By cl. 1 (2.) it was provided that subject to the statutes of the cathedral, the Dean and Chapter should possess all rights powers and privileges theretofore enjoyed by them and be subject to all laws and customs by which the Dean and Chapter had theretofore been governed and regulated. Section 2 provided: "The Bishop is the "Visitor of the cathedral and shall have power to do all such "things as belong as of right to the office of Visitor." Then follow the statutes, the first of which deals with the position of the Bishop. By cl. 5 (I.) it is provided that the Bishop may at any time upon giving due notice hold a visitation at his own volition and shall hold a visitation when desired to do so by the Dean and any two canons. Sub-clause (3) of cl. 5 provided: "In the event of any dispute arising as to the "interpretation of the constitution or the statutes the Visitor, "at the request of the Dean or of any two canons, shall, after "consultation with the Chancellor of the diocese, give his "decision in writing, which decision shall be final: Provided "that, if any doubt or dispute arises regarding the extent "of the authority of the Bishop as Visitor, the doubt or "dispute shall be referred to the Archbishop of York, whose "decision shall be final."

The other statutes provide for a variety of matters and I need only refer specifically to some of them. Statute III. provided that all powers and duties in matters relating to the cathedral except those otherwise assigned by the statutes were, subject to the constitution and statutes to be exercised by the Chapter and that the Chapter, subject as aforesaid, should maintain and regulate the services. At the regular meetings of the Chapter the Dean was to lay before the Chapter such business as might be expedient to be transacted relating, inter alia, to the "Services of the Cathedral." The cathedral services (Statute (IX.) 4), were to be the special care of the precentor and parochial services (Statute (IX.) 5) and the cure of souls in the parish were to be the special care of a minor canon. The parish of Ripon was attached to the cathedral. Statute X. dealt with the organist and choirmaster, and Statute XI. with the lay clerks and choristers. Statute XIII., headed "Of the Services," was as follows: "I. Subject to "the provisions of the statutes, the regulation and direction of "all services (including parochial services) held in the cathedral "and the control of such persons as officiate thereat, shall rest "solely with the Dean or in his absence with the canon in "residence. 2. (I.) There shall be full choral services every "Sunday morning and evening throughout the year with "a sermon at each service. On Christmas Day, on Good "Friday and on Ascension Day there shall be such services "and sermons as the Chapter, subject to the statutes, from "time to time appoints. (2.) Subject to such exceptions as "the Chapter may from time to time deem necessary, there "shall be choral matins and evensong daily throughout the "year," with certain exceptions. There is no doubt that the scheme has the effect of an Act of Parliament. It is part of the law of England and is part of the ecclesiastical law in the wide sense in regard that it relates to a matter concerning the Church of England. But it is in my view necessary to determine whether the provisions which it is sought to construe, and compliance with which the court was asked by the writ to enforce by mandatory order, are part of the ecclesiastical law in the sense of law administered by ecclesiastical courts and persons and not by the temporal courts. A conclusion on that matter is necessary in considering the jurisdiction of this court to entertain the proceedings and the propriety of exercising that jurisdiction.

It is beyond dispute that there is a body of law which is administered and enforced by ecclesiastical courts alone. Coke draws the distinction in *Caudrey's* case (1) where he says: "And as in temporal causes, the King, by the mouth of "the Judges in his Courts of Justice doth judge and determine "the same by the temporal laws of England: so in causes "ecclesiastical and spiritual, as namely, blasphemy, apostasy "from Christianity, heresies, schisms, ordering admissions, "institutions of clerks, celebration of divine service, rights of "matrimony, divorces . . . . (the conusance whereof belongs "not to the common laws of England), the same are to be "determined and decided by ecclesiastical Judges, according "to the King's ecclesiastical laws of this realm." Many of the topics included in Coke's list have passed out of the jurisdiction of the ecclesiastical courts to the jurisdiction of the temporal courts, but much still remains to the ecclesiastical courts. Included in the matters which so remain is the celebration of divine service.

This distinct meaning of ecclesiastical law—law enforced by ecclesiastical courts—(I propose hereafter to call that law "ecclesiastical law" and to refer to all law other than ecclesiastical law as "the general law") has been in terms recognized by the legislature. Section 3 of the Welsh Church Act, 1914, provides that "As from the date of disestablishment, "ecclesiastical courts and persons in Wales and Monmouthshire "shall cease to exercise any jurisdiction, and the ecclesi-"astical law of the Church in Wales shall cease to exist as law." Section 21 of the Irish Church Act, 1869, was to the same effect.

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(1) (1591) 5 Co. Rep. 8b. xxvii.

Apart from statutory provision the propriety of drawing a distinction in the law of this country as a whole by reference to the jurisdiction of the ecclesiastical courts and the jurisdiction of the temporal courts has the support of Lord Blackburn in *Mackonochie* v. *Lord Penzance* (1) and of the Lord Chancellor in *Representative Body of the Church in Wales* v. *Tithe Redemption Commission* (2). Ecclesiastical law is part of the law of the land: (*Mackonochie* v. *Lord Penzance* (1).) The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts. Where a matter of general law arises incidentally for consideration in a case before an ecclesiastical court, that court is bound to ascertain the general law and order itself accordingly; and where a matter depending on ecclesiastical law finds a place in a cause properly before the temporal courts those courts similarly will ascertain for themselves the ecclesiastical law and apply it as part of the law they administer. Each court ascertains the law by reason and argument—not by evidence—see *Gould* v. *Gapper* (3); *Reg.* v. *Millis* (4); *Gore-Booth* v. *Bishop of Manchester* (5). The unity and coherence of the law is not affected by the division of jurisdiction as to its enforcement. The distinction between ecclesiastical law and the general law is not merely a matter of jurisdiction. It has its practical consequences. The sanctions—and sanctions are all important in law—are different. For an offence the temporal courts punish by fine, imprisonment and other pains and penalties. In a civil cause damages may be awarded and injunctions (in some cases mandatory injunctions) disobedience to which is a contempt of court, may be granted. The remedies provided by ecclesiastical law are different. The ecclesiastical courts have no power to give damages or grant injunctions or, subject to certain minor exceptions, inflict any of the punishments open to the temporal courts. The remedies open to it are monition,

(1) (1881) 6 App. Cas. 424, 446.

(2) [1944] A. C. 228, 240.

(3) (1804) 5 East. 345.

(4) (1844) 10 Cl. & Fin. 534.

(5) [1920] 2 K. B. 412.

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suspensio ab ingressu ecclesiæ, penance and excommunication, and against Clerks in Holy Orders, further remedies such as suspension from office or benefice, deprivation of benefice, inhibition from exercising the cure of souls, deposition or degradation.

There is, of course, a body of law concerning the Church of England which does not form part of ecclesiastical law in the sense in which I have defined it. For instance, the right of property to an advowson and the obligation of parishioners to repair a church (other than the chancel) were, and in the former case continue to be, enforced in the temporal courts (see per Blackburn J. in *Bishop of Exeter* v. *Marshall* (1), *Veley* v. *Burder* (2)). Subject matter is no certain test of ecclesiastical law.

Lastly, the temporal courts have a certain jurisdiction in relation to the ecclesiastical courts and, arising out of that jurisdiction, some concern with matters which come before those courts. If an ecclesiastical court decline to exercise jurisdiction vested in it, the temporal court may by mandamus compel the ecclesiastical court to take the case into consideration (*Reg.* v. *Archbishop of Canterbury* (3). If the ecclesiastical court exceeds its jurisdiction or powers by trying or deciding a matter not within its jurisdiction, the temporal court may by prohibition restrain the ecclesiastical court. It would also appear that a writ of prohibition may issue where the ecclesiastical court misconstrues an Act of Parliament, though the extent of this jurisdiction may be open to discussion. (See *Mackonochie* v. *Lord Penzance* (4) and Phillimore's Ecclesiastical Law, 2nd ed., vol. II., p. 1116). The line of demarcation between what is properly only a matter for appeal to a higher ecclesiastical court, and matter for prohibition by a temporal court is difficult to draw, but the temporal courts are not courts of appeal from the ecclesiastical courts. Within their jurisdiction the temporal courts are supreme, and that supremacy is marked by the fact that a temporal court is not on a matter of ecclesiastical law bound by the decisions of the highest ecclesiastical courts. (See *Mackonochie* v. *Lord Penzance* (4).)

That is a general picture of the relation between the ecclesiastical law and the general law. The distinction between th ecclesiastical law and the general law is a marked distinction that has obtained throughout the ages. The whole matter, I would add, is the subject of a learned article by my brother Denning in the Law Quarterly Review, vol. 60, page 235,—an article which no one who addresses himself to the topic can afford to neglect and from which I have drawn much instruction.

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(1) (1868) L. R. 3 H. L. 17, 32.

(2) (1841) 12 A. & E. 265, 301.

(3) (1856) 6 E. & B. 546.

(4) (1881) 6 App. Cas. 424, 431, 447, 460.

The National Assembly of the Church of England may legislate in regard to any matter concerning the Church of England. Their Measures, like Acts of Parliament, may form part of the ecclesiastical law or the general law. In other words, jurisdiction in respect of the ascertainment of the meaning of a Measure and the enforcement of the Measure may be conferred by the National Assembly on the temporal courts or the ecclesiastical courts or it may be on both sets of courts, or, as is provided by the Benefices (Ecclesiastical Duties) Measure, 1929, on a new court freshly set up. The question to whom the jurisdiction is given in respect of any Measure or any provision in a Measure, can, in the absence of any express enactment, be determined only by a consideration of the subject to which the Measure is addressed, viewed in connexion with the existing jurisdiction on the same topic or on connected or related topics.

I turn now to consider the question whether the clause under consideration forms part of the ecclesiastical law. There is no express provision and I have stated the test which in that event is applicable. To my mind it forms part of the ecclesiastical law. The Prayer Book sets forth the Order for Morning Prayer and Evening Prayer daily throughout the year. The rubric provides that as part of the morning service there shall be said or sung in English the hymn called Te Deum Laudamus daily throughout the year or the canticle Benedicite. Directions are given as to the use of the Benedictus, or its alternative the Jubilate, in the morning service and as to the canticles in the evening service. It cannot be doubted that the obligation to hold the services as prescribed by the Prayer Book, and to include the canticles in the services, is part of the ecclesiastical law and part of the ecclesiastical law alone. Even the pains and penalties prescribed by the Act of Uniformity, 1662, disappeared in 1840. The provisions in clause 2 of statute XIII. relating to services repeat the obligation to hold services throughout the year (subject to an immaterial exception) but require that the services on Sundays shall be " full "choral services." It surely could not have been intended that the obligation to hold the services theretofore enforceable only as part of the ecclesiastical law should become enforceable as part of the general law, or that while the obligation to hold the services remained part of the ecclesiastical law, the musical form of part of that service should be enforceable as part of the general law. The subject matter to which the clause is addressed precludes any such inference, and a comparison of the remedies available for breach of the provision if it be part of the ecclesiastical law, with those available if it be part of the general law, leads one to the same conclusion. Full effect is given to every part of the measure if the clause to be construed is treated as part of the ecclesiastical law for which proceedings may be taken in an ecclesiastical court in respect of any breach. I do not doubt that a dean and chapter could be sued in its corporate capacity in an ecclesiastical court: (cf. *Londonderry Cathedral* case (1)). Moreover, no possible doubt could exist as to the amenability to suit of the officiating minister. Further, the bishop has jurisdiction to visit. He can and should take into account the law as he finds it. If circumstances so demand, he may admonish or make orders, and disobedience to the orders of the Visitor will, I apprehend, be the ecclesiastical offence of disobedience to the lawful orders of the Ordinary. In my opinion the power to enforce obedience or to punish disobedience to the provisions in question belongs exclusively to an ecclesiastical court.

The question then arises whether this court has any jurisdiction to entertain these proceedings at all. There is much to be said for the view that in light of the history of the law, of the source from which the measure and scheme came, and the particular subject matter under consideration, the jurisdiction of the High Court is impliedly excluded for all purposes, saving, of course, the jurisdiction over the ecclesiastical courts by mandamus and prohibition. If that be so, this action is not maintainable at all: see *Barraclough* v. *Brown* (2). The point is open to doubt and I have not come to any certain conclusion on it. But I have come to the conclusion that, assuming there is jurisdiction in the High Court, this is not a case in which the jurisdiction ought to be exercised, and I propose to deal with this case on those lines. On the assumption that jurisdiction exists, I am of the opinion that the Attorney-General has a locus standi justifying his position as plaintiff. The case in this regard does not differ in principle from an action by the Attorney-General based on the provisions of a statute for breach of which the only remedy expressly given consists of penalties recoverable in a court of summary jurisdiction. Next, the action must, I think, be treated as an action brought for a declaration on a point of construction only. It is against the practice of the court, as I understand it, to grant a mandatory order for the performance of a continuous series of operations, and the holding and conduct of services in a cathedral are a singularly inapt subject for such an order. The plaintiff at the trial, indeed, abandoned the claim for the injunction, but that abandonment was not an abandonment of anything to which, on any view of the case, he was entitled. The inclusion of an unsustainable claim for an injunction cannot, I think, alter the nature of the action. Regard must be paid to the reality of the case.

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(1) (1863) 8 L. T. 863.

(2) [1897] A. C. 615.

The question posed, therefore, is whether the jurisdiction to make a declaration as to the construction of the provision ought to be exercised in a case where any substantive relief, based on the meaning attached to the provision construed, must be sought in another jurisdiction. There is no doubt that the court has a judicial discretion in the matter of exercising the jurisdiction, and equally there is no doubt that it ought only to be exercised with care. Stirling J. stated the rule to be that "where the court is simply asked to make a declaration "of right, without giving any consequential relief, the court "ought to be extremely cautious in making such a declaration "and ought not to do it in the absence of any very special "circumstances" *Grand Junction Waterworks Co.* v. *Hampton U.D.C.* (1). The matter there in issue was the construction of a section of an Act of Parliament. That statement was approved by Romer J. in *Attorney-General* v. *Merthyr Tydfil Union* (2). In the Court of Appeal Lindley M.R. did not question the accuracy of the statement but thought it inapplicable to the case in hand, for there was, as he pointed out, no adequate remedy obtainable elsewhere. I do not understand the plaintiff to dispute this general proposition. His argument, as I understood it, was that in an action by the Attorney-General, brought to obtain a declaration as to the construction of an enactment, and an injunction to secure its observance, the court was, if satisfied that the contentions on the merits put forward by the Attorney-General were correct, bound to make

(1) [1898] 2 Ch. 331, 345.

(2) [1900] 1 Ch. 516, 524, 550.

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a declaration or grant an injunction: or, put in another way, that the court's usual discretion as to the grant of these remedies found no place in an action by the Attorney-General. In my opinion this argument is not well founded. The point has been specifically considered by the Court of Appeal and, to a limited extent, by the House of Lords in *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (1), and by Tomlin J. and the Court of Appeal in *Attorney-General* v. *Westminster City Council* (2). In both cases the question under debate was whether an injunction should be granted. In the first case Kekewich J. had stated that the Attorney-General, coming to complain that a public body was committing an offence against a statute, was entitled as a matter of right to the only relief which the court could grant, namely, an injunction in one form or another. On appeal, Lord Cozens-Hardy M.R. (3) refused to accept the proposition and said it was not the law. Fletcher Moulton L.J. did not deal with the point. Farwell L.J. was of the same opinion as Lord Cozens-Hardy M.R., and summarized his conclusion by saying: "It is "for the Attorney-General to determine whether he should "commence litigation, but it is for the court to determine "what the result of that litigation shall be" (4). On the appeal to the House of Lords (5), Lord Robson alone referred to the point. He dealt with the question from one limited aspect and not from the broad point of principle and his observations do not carry the matter very far.

In *Attorney-General* v. *Westminster City Council* (2) it would appear that the defendants did not raise any objection to the propriety of making a declaration, but did object to the granting of an injunction. It does not appear from the Law Reports that the proceedings in the Court of Appeal in *Attorney-General* v. *Birmingham, Tame and Rea District Board* (1) were cited either to Tomlin J. or the Court of Appeal, and the judgments given suggest to my mind that those proceedings were not in fact cited. Tomlin J. accepted the view that the granting of an injunction was a matter of discretion and gave his reasons for exercising his discretion in that case, observing that it was not for the court to investigate whether an illegal act is for the public benefit. In the Court of Appeal Lord Hanworth M.R.

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(1) [1910] 1 Ch. 48, 53; [1912] A. C. 788.

(2) [1924] 1 Ch. 437; [1924] 2 Ch. 416.

(3) [1910] 1 Ch. 53.

(4) Ibid. 61.

(5) [1912] A. C. 788.

made some observations on which the plaintiff relied, but those observations, when read in light of the contention with which he had to deal—that the breach of law was not contrary to the public interest and that no injury to the public generally was shown—do not, I think, really assist the plaintiff in his contention here, though the language used is somewhat general. Warrington L.J. treated the granting of an injunction as a matter of discretion. Sargant L.J. dealt with the matter shortly but pointedly by saying: "Of course the discretion as to the relief "to be granted whether by injunction or otherwise, still rests "with the court." Sargant L.J.'s statement covers a declaration as well as an injunction: and in my view, for the purpose in hand, namely, the existence of a discretion in the court, no distinction can, I think, be drawn between those remedies, though it may well be that there are circumstances which may warrant the making of a declaration, but which do not warrant the granting of an injunction.

I turn now to consider what are the circumstances, and what special circumstances can be found which show the propriety of exercising the jurisdiction. Many things to which the lay mind might attach importance are irrelevant. It is irrelevant that the relators are not and cannot be members of the Church of England. It is irrelevant that the relators are probably more concerned with the dignity and consequence of cathedral services in general—a matter with which the court in this case is not concerned—than with the form of the services in Ripon Cathedral. It is irrelevant that Ripon Cathedral serves the purpose of a parish church and that the parochial church council as a whole, and the church meeting with one dissentient, approve the present form of services, and that there is no evidence of public injury, for the law is to be obeyed whatever be the wishes of those affected by it, and it is not for the court to dispense with its observance. It is, I think, irrelevant that the action is an action by the Attorney-General. I draw no distinction between proceedings by the Attorney-General ex officio and proceedings by him at the instance of a relator for the Attorney-General, as I have held, is not a privileged suitor. It is irrelevant that the question raised affects only Ripon Cathedral and not cathedrals generally, for I may observe that a tedious search through the statutes of all the cathedrals and collegiate churches made under the Cathedrals Measures, 1931 and 1934—a search which I undertook for the purpose of informing my mind on the merits—has not resulted in my finding in any other of the cathedral statutes the phrase "full choral services," or, except in two cases, the phrase "choral services," and I may observe one finds the lamentable qualification to the obligation to hold choral services—"so far as funds admit." And lastly, with considerable regret, I regard it as irrelevant that the substantive point at issue is one on which I have not found any particular difficulty in making up my mind.

Are there any special circumstances pointing to the desirability of the intervention of the court? I can find none. All the circumstances point the other way. Proceedings can be taken in an ecclesiastical court. That jurisdiction has not been invoked. The Bishop has his powers as Visitor. He has not been appealed to as Visitor. The statute contemplates that, in certain circumstances, the Bishop may conclusively determine the construction of the statutes and, if there be disagreement between members of the Chapter, his power under the statutes comes into play. The Dean and Chapter, it was stated in court, were prepared to obey the law, whatever it might be. The law can be ascertained in an ecclesiastical court. The Dean and Chapter, in obedience, it may be—I do not know—to the Aristotelian precept not to seek in anything a greater certainty than its nature admits—(a precept which is as good law as it is good sense)—have not put forward any substantive case as to the meaning of the clause. They have contented themselves with denying the accuracy of the plaintiff's construction, and with placing fairly before the court the evidence which might help the court in arriving at a conclusion on construction. They do not ask me to construe the provision. In these circumstances I think it would be merely officious for this court to construe the statute. I decline to exercise the jurisdiction I have assumed to exist and I do not propose to embarrass the parties by expressing gratuitously my apprehension of its meaning.

There is only one other matter to which I need refer. It was not contended by the defendants that the provision in question was merely a matter of internal regulation of the cathedral, so that only the Bishop, the Dean and Chapter and the members of the Chapter were in law concerned with its observance or non-observance, and that the scheme was part of the law only in this sense. While reflecting on the case it occurred to me that this point might require consideration. But a conclusion upon it could not, I think, have been reached except after

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taking into account the position in law of the former statutes which were repealed by the present statutes. History must have its say. But on that all I can glean is that the Diocese of Ripon was set up pursuant to a scheme under the statute 6 and 7 William 4, c. 77, that the scheme under which the former statutes were made had effect as if enacted by that Act (see s. 14), and that the Dean and Chapter, with the sanction of the Bishop, could alter the statutes. In the circumstances I have neglected this possible aspect of the case, and that, of course, is not a matter of which the plaintiff can complain. The action is dismissed with costs.

Solicitors: *Lee, Bolton & Lee; Crossman, Block & Co., for Hutchinson & Buchanan, Ripon.*

H. L. L.

HALIFAX AND OTHERS *v.* THE COAL COMMISSION.

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Jan. 25, 26; *Feb.* 15.

Mine—Coal mine—Lease of seams of coal—Rents and royalties—Annual payments by lessee for damage by subsidence—Sale and conveyance of surface by lessors reserving right to work and let down without compensation—Separation of ownerships of surface and of subjacent minerals—Coal commission—Acquisition of fee simple in coal and mines—Right to receive payments for damage by subsidence—Coal Act, 1938 (1 & 2 *Geo.* 6, *c.* 52), *ss.* 3, 4; *sch. II., parts* 1 *and* 2.

A lease of certain seams of coal was granted to a colliery company. At various earlier dates the lessors had, by different conveyances, sold and conveyed the surface of the areas above the seams, reserving, by each conveyance, the right to work the minerals so as to let down the surface, without paying compensation to the owners or lessees of the surface. In the lease were covenants by the colliery company to pay rents and royalties. Clause 21 provided that the lessees (the company) should make annual payments to the lessors for damage by subsidence to the surface of areas from under which the lessees had worked seams of coal, in return for which the lessors undertook to keep the lessees indemnified against all actions, claims or demands in respect of loss or damage to the surface of the lands or to anything thereon. The company worked and got coal in two seams demised by the lease. On July 1, 1942, the fee simple in all coal and mines of coal vested, by virtue of the Coal Act, 1938, in the Coal Commission. The sums due from the company under cl. 21 in respect of the working for the year ending June 30, 1943, amounted to 53*l.* 19*s.* 10*d.*:—

Held, that the payments for damage by subsidence reserved by

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cl. 21 were either rents or additional royalties, and that therefore the right to receive them had passed by operation of law to the Coal Commission, inasmuch as the statutory vesting in the Coal Commission of the reversion to the lease operated as an assignment to the Commission of the reversion, with all the incidents of that assignment.

Earl Fitzwilliam's Collieries Co. v. *Phillips* [1943] A. C. 570, and *Sunderland Orphan Asylum* v. *River Wear Commissioners* [1912] 1 Ch. 191, considered and applied.

ADJOURNED SUMMONS.

This was a summons to determine whether the right under a mining lease, dated April 5, 1935, to receive from the lessees annual payments for damage by subsidence, was vested since July 1, 1942 (the vesting date under the Coal Act, 1938), in the lessors or in the Coal Commission. At dates prior to that of the lease the lessors had sold, and had conveyed by various conveyances, the surface of areas in which were certain seams of coal and had reserved by each conveyance the right to work the minerals below the surface of the hereditaments conveyed, so as to let down the surface, without paying compensation to the owners or lessees of the surface. The lease of April 5, 1935, comprised seams of coal below those surfaces, and was for a term of ninety-nine years from July 1, 1917. It was described as a consolidated lease and was expressed to be supplemental to a lease executed in 1909. By cl. 2 of the lease the lessors granted liberty and power for the lessees, but without entering on the surface except as authorized by the lease, to get and dispose of the coal demised. Clause 2 of the scheduled form of lease was: "The lessees for themselves and "their assigns hereby covenant with the lessors . . . . that "the lessees will henceforth during the residue of the period "specified in the consolidated lease pay the rents royalties and "sums of money expressed to be reserved and made payable "by and perform and observe the covenants and conditions "on the part of the lessees in the consolidated lease . . . ." Clause 14 read: "The following rents shall be paid by the lessees "to the lessors by equal half-yearly payments (except the "subsidence damage payment reserved by cl. 21) on January 1 "and July 1 in every year . . . ." Clause 21 was: "The "lessees shall . . . . pay to the lessors on July 1 in every "year . . . . £10 in respect of damage by subsidence to the "surface overlying every acre (and so in proportion for fractions "of an acre) from under which the lessees shall have worked

" . . . . the Parkgate seam of coal during the preceding year " and 5*l.* in respect of damage by subsidence to the surface " overlying every acre (and so in proportion for fractions of an " acre) from under which the lessees shall have worked . . . . " any . . . . seams of coal hereby demised (other than the " Parkgate seam) during the preceding year . . . . and in " consideration of the payment of such . . . . sums . . . . " the lessors will . . . . keep the lessees indemnified against " all actions claims and demands in respect of loss or damage " . . . . to the surface of the . . . . lands . . . . or to any " . . . . things whatsoever thereon . . . . caused by the " working getting and removal . . . . of the mines and " minerals . . . ." Clause 35 was: " Subject as herein " mentioned and so far as the lessors have power to grant this " liberty the lessees may work the coal hereby demised and coal " under any adjoining and neighbouring lands without leaving " or providing any vertical or lateral support for any of the " described lands or any part or parts thereof or any buildings " works erections or other things now being or which may " hereafter be upon the same or any of them other than and " except such support (if any) as may be required to be left " under the covenants or provisions herein contained." In cl. 36 the lessees covenanted to pay the rents, royalties or sums of money reserved or made payable by the lease, and in cl. 38 they covenanted to pay from time to time full compensation for all damage to the surface of the described lands (except damage from which they might be exempted because of the surface damage payment payable under cl. 21 in the possession of the lessors or their tenants or lessees or to any horses, cattle or other animals, trees, crops or herbage for the time being thereon arising from or caused by any works of the lessees. Clause 59 was: " If the rents royalties or sums . . . . hereby " made payable . . . . shall be in arrear and unpaid for thirty " days after the same . . . . shall be payable . . . . or if " . . . . the lessees . . . . shall make any default in per- " forming or observing any of the covenants provisions or " conditions herein contained . . . . it shall be lawful for the " lessors . . . . to re-enter upon the demised premises . . . . " and thereupon this present lease shall absolutely " determine . . . ." The lessees worked and got coal in two seams demised by the lease. On July 1, 1942, by virtue of the Coal Act, 1938, the fee simple in all coal and mines of coal vested in the Coal Commission. The sums due from the lessees under cl. 21 of the lease in respect of the work for the year ending on June 30, 1943, amounted to 53*l.* 19*s.* 10*d.* The Commission contended that, in respect of such parts of the surface as at the valuation date for the purposes of the Coal Act, 1938 (January 1, 1939) were vested in ownership separate from that of the mines and minerals comprised in the lease, the right to receive the payments under cl. 21 was, and had since July 1, 1942 (the vesting date) been vested in them, and they claimed to be paid the 53*l.* 19*s.* 10*d.* by the lessees. The lessors contended that they still had the right to those payments. They contended, first, that it was not such a property or right annexed to the coal or mines of coal as was acquired by the Commission with the fee simple by virtue of ss. 3 and 4 of the Coal Act, 1938 (1) and, secondly, that the right to withdraw

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(1) By s. 1, sub-s. 1, of the Coal Act, 1938: "There shall be a "Coal Commission (in this Act "called 'the Commission') to "exercise and perform the powers "and duties set out in the Act."

By sub-s. 2: "The Commission "shall be a body corporate by the "name of 'the Coal Commission' "with perpetual succession and a "common seal, and with power to "hold land without licence in "mortmain."

By sub-s. 3: "The provisions "of the First Schedule to this Act "shall have effect with respect to "the constitution and procedure "of the Commission."

By s. 3, sub-s. 1: "The Commission shall acquire in accord"ance with the provisions of this "part of this Act the fee simple in "all coal and mines of coal, "together with such property and "rights annexed thereto and such "rights to withdraw support as "are hereinafter mentioned, sub"ject to such servitudes, restric"tive covenants and other matters "adversely affecting any of the "said coal or mines as are herein"after mentioned, and subject to "the provisions of this Part of this "Act with respect to the retention "of interests arising under coal"mining leases and of certain "other interests."

By sub-s. 2: "During the "period between January 1, 1939 "(in this Act referred to as 'the "'valuation date') and July 1, "1942 (in this Act referred to as "'the vesting date') all coal and "mines of coal shall be held as if "all the existing owners thereof "had, in respect of all their in"terests therein other than re"tained interests and the full "capacity so to do, entered into a "contract on the valuation date "for the sale thereof to the Com"mission, at a price to be ascer"tained by valuation, with pro"vision for completion of the "contract on the vesting date.

By sub-s. 3: "On the vesting "date all coal and mines of coal as "existing at that date shall vest "in the Commission for a title "comprising all interests then "subsisting in any such coal or "mine other than retained "interests."

By Part II., para. 5: "In a case "in which the fee simple in the "coal or mine, or the term of "years under a coal-mining lease "thereof, was vested on the

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support from the surface of the areas in question was vested in persons other than the lessors in whom the fee simple was then vested, and that the right to withdraw support which, by virtue of the second schedule to the Act, vested in the Commission, did not include the right to receive payments under cl. 21 of the lease. By this summons, to which the Commission were defendants, the lessors asked whether that sum of 53*l.* 19*s.* 10*d.* was payable to them or to the Commission.

J. B. Herbert for the lessors. The right to receive moneys payable by the lessees under cl. 21 must remain in the lessors unless there is some provision in the Act whereby it is transferred to the Commission. Where, as in this case, the ownership of the surface and the minerals has been severed before the valuation date, a right to withdraw support vests in the Commission by virtue of Part II., para. 5, of the Second Schedule or not at all. The right to withdraw support which vests under that paragraph is similar in all respects to that "annexed" to the coal. Where there is in existence, as here, a mining lease granting a right to withdraw support on condition that a rent shall be paid in lieu of liability for paying compensation for surface damage, the right to withdraw support which is annexed to the coal and vests in the Commission is not absolute, but subject to the payment of that rent. That is shown by the wording of the proviso to para. 5, which clearly contemplates that, where the owner of the minerals has an absolute right to withdraw support but, by a mining lease, has granted a right to withdraw support limited in duration, the right annexed to the coal is, subject to the proviso, not

"valuation date in a person other "than the person in whom the fee "simple in land supported thereby was then vested, and any "right to withdraw support from "that land, other than a right "granted by a working facilities "order, was then annexed to the "coal or mine, there shall vest in "the Commission therewith a "right to withdraw support from "that land similar in all respects, "whether as regards terms, conditions, extent, duration (save "as in this paragraph provided) or "otherwise, to the said right, that "was then annexed to the coal or "mine: Provided that, where the "fee simple in the coal or mine "and the fee simple in land supported thereby was vested in "the same person but the term of "years under a coal-mining lease "was subsisting in the coal or "mine and a right to withdraw "support was annexed thereto, "the duration of the right that "vests in the Commission shall "extend to the whole of the period "during which any coal to which "the first-mentioned right was "annexed remains ungotten."

absolute, but that which has been granted by the lease. Alternatively, if the right "annexed" to the coal is the absolute right which the owner of the minerals had before the valuation date, it does not follow that the right to the rent in question has vested in the Commission. That is payable under a collateral covenant, and does not vest in the Commission under para. 5 as part of the right to withdraw support.

Roxburgh K.C. and *Wilfrid Hunt* for the Commission. As the fee simple in the minerals became vested in the Commission by the Act, the Commission now have all the lessors' rights and are under all the liabilities which the lessors were under. The right which the lessors had before the Act has not now, and could not now have, any independent existence in law. The object of the Act was to enable the Commission to grant seams of coal so that they could be worked profitably. It would be strange, therefore, if there should exist some right of support not transferred to the Commission, but left existing so as to enable persons to collect payments under leases in which they have no interest whatever. If the argument for the lessors is correct, the legislature, in every such case, has conferred on the Commission the fee simple in the coal, but the right to withdraw support only for the terms granted by the leases. That cannot be so. The Commission are in the position of assignees of the reversion, subject to and with the benefit of the lease: *Sunderland Orphan Asylum* v. *River Wear Commissioners* (1). The payments under cl. 21 are in the nature of rent, and the title of the Commission to them is precisely the same as their title to the royalties: cf. *Earl Fitzwilliam's Collieries Co.* v. *Phillips* (2). The right of the lessors must necessarily be purely contractual, and the contract is not collateral, but is a covenant touching the lease of the minerals and the right to work them. It cannot be distinguished from the covenant to pay royalties, the benefit of which has passed under the general law by virtue of the assignment of the reversion. Alternatively, the Commission are entitled to the payments under cl. 21 by virtue of para. 5 of Part II. of Sch. II. to the Act. It is clear that the lessors are no longer entitled to the payments under cl. 21.

Herbert in reply. The effect of the Act, not the general law, has to be considered. If this covenant in cl. 21 of the lease has passed, it must be bound up with that part of the demise which is concerned with the right to withdraw support.

(1) [1912] 1 Ch. 191.

(2) [1943] A. C. 570.

In considering what was taken from the lessors and vested in the Commission, it must be borne in mind that there must be plain words or implication to show that what was taken from them and vested in the Commission was the right to receive this sum of 53*l.* 19*s.* 10*d.* for the year ending June 30, 1943, and other sums every year for the duration of the lease. Those plain words cannot be spelled out, nor that implication derived, from para. 5. The right annexed to the coal or mine, at any rate in the present case, includes the right prescribed in the lease, and para. 5 cannot be construed to show that the whole of the lessors' right to withdraw support has passed to the Commission so as to avoid or assign the benefit of the covenant in cl. 21. The lessors still have the reversion, and the contract in cl. 21 is purely collateral. The right which the lessors have by virtue of it is profoundly distinguishable from the right to royalties.

1945. Feb. 15. ROMER J. stated the facts, read cls. 1 and 2 of the lease, and cls. 13, 21, 29, 31, 35 and 38 of the scheduled form of lease, and continued: Had there been nothing more than cl. 21 of the lease clearly all moneys payable by the lessees under that clause, including the sums now in question, would be payable to and receivable by the lessors. The Commission claim, however, that under the Coal Act, 1938, the right to receive those moneys has become vested in themselves, since July 1, 1942, to the exclusion of the lessors, who are entitled, in substitution for their pre-existing right, to compensation under the relevant provisions of the statute. It is, I think, plain that if a right which formerly belonged to the lessors has, without their consent, been divested from them and become vested in the Commission, that must have been by the express provisions of the Act, by reasonable implication from its provisions, or by operation of law. [His Lordship then referred to ss. 1, 3 and 4, and to Parts I. and II. of the Second Schedule of the Coal Act, and continued:] Mr. Roxburgh, for the Commission, contended that as the fee simple in the minerals demised by the lease has admittedly become vested in the Commission by the Act, the Commission are for all material purposes entitled to all the rights and subject to all the liabilities which attached to the lessors; that the position is just as if the lessors had assigned the reversion to them subject to and with the benefit of the lease, and as the payments in question are a species of rent, the commission are now entitled to them in the same way as they are entitled to the minimum rents and royalties payable under the lease. That, he says, follows as a matter of general law from the vesting of coal effected by the Act. Alternatively, he says that the Commission are entitled to the payments by virtue of para. 5 of Part II. of the Second Schedule to the Act. Mr. Herbert, for the lessors, contends that the general law has nothing to do with the matter, that the parties' respective rights are governed solely by the Act, and that as there is nothing in the Act which, either expressly or by implication, vests this particular right in the Commission, it remains and will remain the property of the lessors. He contends that the bargain in cl. 21 of the lease is a personal agreement, collateral and not incidental to the lease and that, accordingly, the benefit and burden thereof would not pass on an assignment of the reversion but would remain a matter of personal contract between the lessees and the lessors, and do so remain notwithstanding the vesting of the coal and mines in the Commission.

I think that this contention is of primary importance from whatever aspect the problem is regarded, whether from that of the general law or from that of para. 5 of Part II. of the Second Schedule, on the true construction of which, Mr. Herbert argues, the right in question has not passed to the Commission but remains vested in the lessors. If that contention were sound, the result would be curious, for, first, the liability to pay the moneys in question would not pass to an assignee of the term, and, secondly, the lessors would still be able to enforce the covenant against the lessees, although they (the lessors) no longer have any interest either in the surface of the lands or in the subjacent minerals. The question, however, whether the payments under cl. 21 are or are not "rents," or in the nature of "rents," or "royalties," and as such are incidental to the lease, is primarily one of the construction and effect of the lease. Before further considering its provisions, however, I shall refer to the decision of the House of Lords in *Earl Fitzwilliam's Collieries Co.* v. *Phillips* (1), where the quality of moneys similar to those payable under cl. 21 was considered in relation to a provision in a taxing statute, namely, the Finance Act, 1934, s. 21. The headnote sets out the material parts of s. 21 of the Finance Act, 1934, and continues: "Under a lease executed in "1935 certain mines were demised to the appellants in con-

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(1) [1943] A. C. 570.

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"sideration of rents and payments thereby reserved for a "term of ninety-nine years. By cl. 2 the appellants were "granted the liberty, in working the minerals, to withdraw "support from the surface overlying the area, without making "any compensation for damage except as thereinafter provided. "Under cl. 5, in addition to certain rentals and royalties, the "appellants were bound to pay half-yearly certain sums for "every acre of so much of the seams of coal as had been worked "in the preceding half year, 'as liquidated damages in respect "'of the overlying surface . . . . let down': Held, that the "payments were 'rent' within the definition of s. 21, "sub-s. (4) (*c*) of the Act. Held, further (Lord Romer dis-"senting), that the leave conferred upon the lessees was an "'easement' within the definition of s. 21, sub-s. (4) (*b*), "of the Act, and that, accordingly, the rent paid in respect of "it could not be deducted from the appellants' profits for the "purposes of assessment to income tax." Lord Russell of Killowen said (1): "Counsel for the appellants argued in the "first place that the payments under cl. 5, sub-cl. (3) (F) of "the lease did not come within the section's definition of rent. "As to this I feel no doubt. In my opinion, while they might "well be said to be periodical payments in the nature of rent, "they certainly fall within the word 'royalty.' The fact that "in various parts of the lease distinctions are drawn such as "'rent or payment' (cl. 6), 'rent or sum of money' (cl. 8) "and 'rents and surface damage payment' (cl. 11), seems "irrelevant. If the payment is within the section's definition, "the fact that the document calls it something else, or even "states that it is not rent, would seem to be immaterial." Lord Wright said (2): "There remains the further question "whether the payments under cl. 5, sub-cl. (3) (F), are 'rent' "within the definition of the Act. That definition is very wide. "It includes (inter alia) a 'royalty or annual or periodical "'payment in the nature of rent': s. 21, sub-s. (4) (*c*). "In my opinion, the payments in question come within the "definition as being periodical payments in consideration of the "enjoyment by the appellant company of the 'easement' "which, in my opinion, was conferred by the lease. That is my "opinion when I look at the substance of the matter and dis-"regard the mere language of cl. 5, sub-cl. (3) (F). The "description of these payments as liquidated damages cannot, "in my opinion, prevent the respondent from insisting on their

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(1) [1943] A. C. 577.

(2) Ibid. 581.

"true character, if they come, as in my opinion they do, within "the definition of rent given in the sub-section. The Crown's "right to tax cannot be affected by the mere words which the "parties have chosen to use. The word 'rent' is itself a word "of very wide import, not always correctly employed in "ordinary current user, particularly in taxing provisions. "'Rent' at common law, in its strict sense, could not properly "be applied to denote a rent reserved in a lease of incorporeal "hereditaments because rent would not issue out of the "premises: *Buzzard* v. *Capel* (1); but such payments would "ordinarily be called rent. In *Coltness Iron Co.* v. *Black* (2), "Lord Blackburn observes on the use which he says is perhaps "not quite accurate of the term 'rent reserved in a mineral "'lease,' to describe what in one sense is payment by instalments "of the price of minerals forming the land. In s. 21 'rent' is "so defined as to include the periodical payment to be made in "respect of any easement within the meaning given in the "section. 'Royalty' is also included as an alternative "category. I think that the periodical payment in this case "comes within the statutory definition. It follows that it "cannot be deducted by the appellants in computing their "annual profits or gains because by s. 21, sub-s. (1) of the Act "of 1934 it is to 'be treated for the purpose of so much of the "'provisions of the Income Tax Acts as refer to royalties paid "'in respect of the user of a patent as if it were such a "'royalty'." Lord Romer said (3): "My Lords, in my "opinion the Court of Appeal were unquestionably right in "holding that the payments specified in sub-cl. (3) (F) of cl. 5 "of the lease of January 31, 1935, are rents within the meaning "of s. 21 of the Finance Act, 1934. The fact that they "are expressed to be payable 'as liquidated damages' and "'in lieu of paying compensation for damage or injury which "'may be occasioned by subsidence' seems to me to be quite "immaterial. It cannot alter the essential nature of the "payments, which is plainly that of additional royalties. "A horse may be accepted in discharge of a claim to damages. "Nevertheless, it remains a horse."

That case admittedly did not decide that the payments were "rent" for all purposes. It decided that they were "rent," or "royalties," within the meaning of s. 21 of the Finance Act, 1934. I think, nevertheless, that Lord Romer's statement that "the essential nature of the payments is plainly that of "additional royalties," indicated that, in his view, the payments were stamped with that character as between lessor and lessee and not only that they were of that nature for the purpose of the legislation which was then before the House.

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(1) (1828) 8 B. & C. 141.

(2) (1881) 6 App. Cas. 315, 335.

(3) [1943] A. C. 570, 582.

[His Lordship then referred to cl. 1 of the lease, and to cls. 2, 13, 14, 36, 59, 61 and 66 of the scheduled form of lease and continued :] Having regard to those provisions, I think that it would be difficult, if not impossible, to conclude that cl. 21 is a mere collateral agreement, a bargain personal to the contracting parties. In my judgment it is essentially linked up with the demised coal, the right to get which, and the liability for the payments reserved, are just as incidental to the lease as is the liability to pay the rents and royalties. The definition of the lessors and lessees, the duration of the liability, the right to re-enter on default, and the general framework of the lease, all, in my opinion, negative the view that those payments do not touch or concern the thing demised. The question whether they fall to be made at all depends solely on the working of the demised minerals, as also does the ascertainment of the amounts and times of such payments, if any, in fact, have to be made. The payments are related solely to the abstraction of coal from the demised seams ; and it is to protect those working the coal under the lease that the corresponding indemnity by the lessors is given. In my judgment, those payments are either rents or additional royalties. If that be so, prima facie the right to receive them has passed, by operation of law, to the Commission, inasmuch as the statutory vesting in them of the fee simple to the mining lease operates as an assignment to them of the reversion, with all the incidents of such an assignment : *Sunderland Orphan Asylum* v. *River Wear Commissioners* (1). True, the Act does not expressly mention payments such as those now in question, but there was, I think, no need for it to do so. The Act does not deal directly with the right to receive royalties in the ordinary sense, but it could scarcely be contended that, by reason of that reticence, that right has not passed to the Commission. In my judgment that right has passed, as also has the right now in issue, under the general law applicable to the position created by the Act.

My conclusion makes it unnecessary to decide the questions which were argued in the alternative, as to the effect, in the

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(1) [1912] 1 Ch. 191.

ROMER J.
1945
HALIFAX v. THE COAL COMMISSION.

present case, of s. 4 and para. 5 of Part II. of the Second Schedule to the Act—the provisions which specifically vest in the Commission certain rights of withdrawing support. These provisions are, in some respects, obscurely framed, and as questions on them may hereafter arise necessitating an express decision, I ought not to state views on them which are not, as I think, necessary for the decision of this case. I shall declare that, on the true construction of the lease, and by virtue of the Act, the 53*l.* 19*s.* 10*d.*, is payable to the Commission, whose costs the lessors will pay.

Solicitors: *Warren, Murton Foster & Swan, for Newman & Bond, Barnsley*; *B. S. Jaquet.*

K. R. A. H.

EVERSHED J.
1945
Apr. 11.

Considered. Re JEEVES. [1949] Ch. 49

In re ALCOCK, DECEASED.

Considered. In re BIRKETT, DECD. [1950] 1 Ch. 330

BONSER AND OTHERS *v.* ALCOCK.

Will—Construction—Bequest of residue "to be divided equally between "my nephew A and the three children of my cousin absolutely"—Mistake as to number of children—"Between"—Meaning.

A testatrix bequeathed the residue of her estate "to be divided "equally between my nephew A and the three children of my "cousin who resides at [address] absolutely." She did not give the name of the cousin, who in fact had four children, all of whom survived the testatrix, and with all of whom, as well as with the cousin herself and with the nephew, the testatrix had been on friendly terms. The four children were of the same generation as the nephew. The testatrix was very ill when she made the will, which was prepared by a firm of solicitors other than her usual legal advisers:—

Held, (1.) that it was clear on the evidence that the intention of the testatrix was to benefit all the children of her cousin, and "four" must be read in the place of "three"; (2.) that in testamentary directions to divide the word "between" had no etymological significance importing division into two; and (3.) that there being neither context nor circumstances which displaced the prima facie rule of division per capita the nephew and the children of the cousin must each take an equal fifth share of the residue.

In re Cossentine [1933] Ch. 119 followed.

In re Walbran [1906] 1 Ch. 64, and *In re Prosser* [1929] W. N. 85, considered and distinguished.

EVERSHED J.

1945

ALCOCK, In re.
BONSER v. ALCOCK.

ADJOURNED SUMMONS.

By her will dated October 23, 1942, a testatrix, inter alia, bequeathed her residue "to be divided equally between my nephew "[name] and the three children of my cousin who "resides at [address] absolutely." The cousin's name was not given. On November 10, 1942, the testatrix died. The cousin had in fact four children, and all four survived the testatrix, who had been on friendly terms with the nephew, the cousin and the cousin's children, who were of the same generation as the nephew. The testatrix was very ill at the time when she made the will, which was prepared in haste by solicitors other than her usual legal advisers. By this summons, which was taken out on November 17, 1944, and to which the nephew and the cousin's four children were made defendants, the sole executor of the will asked, inter alia, whether the residue was divisible among the beneficiaries per capita or per stirpes.

John Pennycuick for the plaintiff.

Christie K.C. and *Vanneck* for the nephew. Whether the nephew is entitled to half or a fifth depends on whether "between" implies division into two or into more than two, and on that question the authorities are in conflict. In *In re Walbran* (1) there was a gift of property for equal division between the children of A and B or their heirs, A and B being nephews of the testatrix. Joyce J. took the view that "between," in strictness, etymologically indicated division into two parts rather than into more, and held that in that case it did imply division into two, so that the children of A received one half and B the other. In *In re Prosser* (2) the gift was "to be equally divided between the children of "my brother A and B," A and B both being brothers of the testator, and Clauson J. followed *In re Walbran* (1). In *In re Harper* (3) which was decided after *In re Walbran* (1) and before *In re Prosser* (2), the gift was to be divided between the unmarried daughters of A and B equally. A had five daughters, three being unmarried, and B one only, who was only five years old. Sargant J. held that the gift was to B personally and not to his "unmarried daughter," and that the proper division was into four equal parts. Finally, in *In re Cossentine* (4), there was a gift "to be divided between the

(1) [1906] 1 Ch. 64.
(2) [1929] W. N. 85.
(3) [1914] 1 Ch. 70.
(4) [1933] Ch. 119.

". . . . Society and the heirs of my brother and sisters." The brother predeceased the testator, leaving one child. The two sisters survived the testator. Maugham J. held that the gift was in equal fourth parts. On the prima facie rule, the text-book writers all agree that a direction to divide between A and the children of B imports division per capita and not per stirpes: see Hawkins on Wills, 3rd. ed., 148, Jarman on Wills, 7th ed., Vol. iii., 1687, and Theobald on Wills, 9th ed., 264. Hawkins, at pp. 149-150, observes that *In re Walbran* (1) was distinguished in *In re Harper* (2), and states that the cases sometimes seem to have been decided on special circumstances. Jarman, at p. 1688, states: "but this mode "of construction" (i.e., the general rule) " . . . . will yield "to a very faint glimpse of a different intention in the "context;" while Theobald, at p. 264, states that "the "construction depends in each case on the surrounding "circumstances." The article on "between" in the Oxford Dictionary, vol. 1., p. 834, was considered in some detail in *In re Cossentine* (3). True, the last paragraph, para. 19, which Maugham J. accepted, is against the nephew, for it states that, in all senses, "between" has been from its earliest appearance, extended to more than two. All the rest of the article, however, shows clearly that it still is properly used to express division into two. There is every indication that the testatrix meant the nephew to have more than the cousin's children, who, after all, were only her first cousins once removed.

Wilfrid Hunt for the cousin's children. On the true construction of the will and in the circumstances—and also, be it noted, in strict accordance with the prima facie rule—the nephew and the four children are each entitled to a fifth. The children are of the same generation as the nephew, and the testatrix was equally friendly with the cousin, the cousin's children and the nephew. "Four" must be read for "three," for the evidence is clear that the testatrix intended to benefit all the cousin's children, and the mistake in the number could have been due only to her illness. Were the argument for the nephew correct, he would get one half, and the four children would get the other half as joint tenants. That would have to follow, and the use of the word "absolutely" shows that the testatrix cannot have intended it. The last paragraph of the article in the Oxford Dictionary, and the judgment of

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(1) [1906] 1 Ch. 64.

(2) [1914] 1 Ch. 70.

(3) [1933] Ch. 119.

Maugham J. in *In re Cossentine* (1) are conclusive. True, the prima facie rule, as stated in the text-books, will be displaced by particular contexts or particular circumstances, or by both, but in the present case there is no such displacing context or circumstance.

EVERSHED J. The falsa demonstratio as to the number of children and the curious way of referring to the cousin are, doubtless, due to the testatrix's illness. Clearly, the reference to " three " children is a mistake. " Four " must be read for " three," because there is no ground on which the court could or ought to choose three children out of the four, or to reject altogether the clear intention to benefit the children of a close friend.

The question which is difficult to decide is whether the effect of the whole phrase is that the nephew is entitled to one-half or only one-fifth of the residue. The shortness of the will does not make the problem easier to solve: see per Maugham J. in *In re Cossentine* (1). The solution must depend on the meaning of the words, a fact which, however, does not end, and may not much lessen, a certain conflict in the authorities which have been cited to me. *In re Walbran* (2) and *In re Prosser* (3) are in favour of the nephew's receiving one-half of the residue, *In re Harper* (4) and *In re Cossentine* (1) of his receiving one-fifth. My diffidence in approaching the matter is the greater for that lack of uniformity.

I conclude that on the true construction of the will the testatrix intended the nephew and the cousin's children to share equally (that is to say, each to take one-fifth), in which conclusion I am, I think, not unassisted by the fact that one legatee was a nephew of the testatrix, and the children were first cousins of the testatrix once removed. The nephew and the cousin's children belong to the same generation. On the evidence, the testatrix was friendly with the nephew and with the cousin's children. The construction at which I have arrived accords, I think, with what a testatrix who is benefiting people of the same generation would be thought to intend in those circumstances. Their being of the same generation is, I fully realize, rather a small matter, but the will is short, and each of the conflicting authorities which have been cited to me was

(1) [1933] Ch. 119.
(2) [1906] 1 Ch. 64.
(3) [1929] W. N. 85.
(4) [1914] 1 Ch. 70.

EVERSHED J.

1945

ALCOCK, *In re.* BONSER *v.* ALCOCK.

decided in the circumstances of the case, so that it is perhaps all the more natural, or even allowable, to rely on slight indications.

Much of the lack of uniformity in the authorities which I have mentioned may, I think, have sprung from the conception given in the earlier of those authorities to the meaning of the word "between." In *In re Walbran* (1) Joyce J. founded himself substantially on his view that, etymologically, the word "between" indicated division into two. In *In re Harper* (2) Sargant J. did not accept that strict view and said that, whatever its etymology, the word in popular usage no longer indicated division into two, as against any other number of parts. In *In re Prosser* (3) Clauson J. substantially followed *In re Walbran* (1) because the language of the wills in the two cases was almost identical. In *In re Cossentine* (4) attention was for the first time closely directed to the proper inference to be drawn from the use of the word "between." Maugham J. examined the article in the Oxford Dictionary on the word and pointed out that, to-day, with reference to a division and particularly to an equal division, the word "between" was not only the natural word to use, but was just as proper as the word "among." I say "just as proper," but, where equal distribution is emphasized, it might well be said to be more proper. In my view, *In re Cossentine* (4) really destroys the foundation of much of the argument in favour of a division into moieties, which prevailed in *In re Walbran* (1). In my judgment it is not true, in 1945, that any inference in favour of division into two can be drawn from the use of the word "between" in a context such as that now before me. I respectfully adopt and follow the opinion of Maugham J. in *In re Cossentine* (5), that "an ordinary man directing a sum to be divided between "the children of his sister and, say, his nephew Jack, would ". . . . be intending a division per capita." That is supported, I think, by the fact that Hawkins on Wills, 3rd ed., at p. 148, Jarman on Wills, 7th ed., vol. iii., at p. 1687, and Theobald on Wills, 9th ed., at p. 264, all take the view that, prima facie, a direction to divide between A and the children of B imports a division per capita among the whole class consisting of A plus all the children of B. That rule must, of course, yield in particular cases to the proper inferences to be drawn from particular instruments. For example, if there was a gift "to A and the children of B" and A was a stranger to the testator and B a brother or sister of the testator, or A was of a different generation from the children of B, it might well be that a division per stirpes and not per capita was intended. In the present case, however, as the nephew and the cousin's children are of the same generation, the prima facie rule stated in the text books is, in my judgment, not displaced.

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(1) [1906] 1 Ch. 64.

(2) [1914] 1 Ch. 70.

(3) [1929] W. N. 85.

(4) [1933] Ch. 119.

(5) [1933] Ch. 119, 124.

The mistake about the number of children troubled me, for it might be said that the number would be much more relevant in the testatrix's mind if she was contemplating division per capita than it would be if she was contemplating division per stirpes. That argument is, I think, fair, but, having regard to the circumstances of the case and to the obvious peculiarity of the description, not strong enough to outweigh what is, in my judgment, the proper inference to be drawn in accordance with the prima facie rule. As Mr. Hunt for the cousin's children said, if Mr. Christie's argument for the nephew succeeded, the result would apparently be to create a joint tenancy, which can hardly be a probable intention where there is a direction to divide "absolutely." In *In re Harper* (1) Sargant J. felt that consideration to be significant, and in *In re Cossentine* (2) Maugham J. referred to it.

I conclude, therefore, that the residue ought, in the present case, to be divided into fifths. I follow *In re Cossentine* (2) and share the view of Maugham J. that, to-day, in directions to divide such as are found in wills, the word "between" has no etymological significance importing a division into two. The prima facie rule stated in the text-books is correct and can be displaced only by a particular context which is strong enough to displace it.

The residue is, therefore, divisible between the nephew and the cousin's children in five equal shares. The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors: *Taylor, Jelf & Co., for C. A. Bonser, Mansfield; Rider, Heaton, Meredith & Mills, for Bevan, Hancock & Co., Bristol; Pritchard, Englefield & Co.*

K. R. A. H.

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(1) [1914] 1 Ch. 70, 75, 76.

(2) [1933] Ch. 119, 124, 125.

C. A.

1945

Mar. 5.

Scott and Morton L.JJ., Cohen J.

In re WARDEN AND HOTCHKISS, LIMITED.

Company—Extraordinary general meeting—Special resolution—Service of notice of meeting—Shareholders having registered addresses abroad—Articles of Association—Long-standing decision on point at issue—Titles to property affected.

A company's articles of association provided that at least seven days' notice of a general meeting should be given to the members; that such notice might be served on any member either personally or through the post in a letter addressed to him at his registered place of abode; and that, if served by post, it should be deemed to have been served at the time when the letter containing it would be delivered in the ordinary course of the post. The company at an extraordinary general meeting passed a special resolution for alteration of its objects. Notices of the meeting had not been sent to five shareholders entitled to vote, who lived and had their registered addresses in South Africa:—

Held, that the meeting was duly convened in manner provided by the articles, pursuant to s. 117, sub-s. 6, of the Companies Act, 1929, and the special resolution was valid. The decision of Malins V-C., on exactly similar articles, in *In re Union Hill Silver Co., Ld.* (1870) 22 L. T. 400, that it was unnecessary to serve shareholders who lived and had their registered addresses abroad had stood, unreversed, for seventy-five years. Whatever would have been the decision of the court had the case been res integra they would not now reverse a decision, the reversal of which might result in casting doubt on titles to property.

Decision of Uthwatt J. [1945] W. N. 22 reversed.

Dicta of Lord Buckmaster in *Bourne* v. *Keane* [1919] A. C. at p. 874 followed.

Appeal in the interlocutory list from a decision of Uthwatt J. (1) on a petition to confirm a special resolution to alter a company's objects.

On January 14, 1944, an extraordinary general meeting of the company was held, at which a special resolution was passed for alteration of the company's objects. Article 42 of the company's articles of association provided, with regard to general meetings: "Seven days' notice at the least, specifying "the place, the day, and the hour of meeting, and in case of "special business, the general nature of such business, shall "be given to the members in manner hereinafter mentioned, "or in such other manner, if any, as may be prescribed by the "company in general meeting; but the non-receipt of such "notice by any member shall not invalidate the proceedings

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(1) [1945] W. N. 22.

C. A.

1945

Warden and Hotchkiss, Ld., *In re.*

"at any general meeting." By art. 109: "A notice may be "served by the company upon any member, either personally "or by sending it through the post in a prepaid letter, "addressed to such member at his registered place of abode." By art. 111: "Any notice, if served by post, shall be deemed "to have been served at the time when the letter containing "the same would be delivered in the ordinary course of the "post; and in proving such service it shall be sufficient to "prove that the letter containing the notice was properly "addressed and put into the post office." Five members of the company, who were entitled to vote, lived and had their registered addresses in South Africa, and notice of the meeting had not been given to them. By this petition the company asked for the confirmation by the court, under s. 5 of the Companies Act, 1929, of the special resolution. For the purposes of s. 117 of the Act, which contains provisions as to extraordinary and special resolutions, by sub-s. 6 of that section notice of a meeting is to be deemed to be duly given and the meeting to be duly held "when the notice is given and the meeting held "in manner provided by this Act or the articles."

Uthwatt J. dismissed the petition but extended the time for appealing to the end of January, 1945 (1). The company appealed.

Gordon Brown for the company. On the true construction of the articles of association, notice of general meetings need not be given to members with registered addresses abroad. The meeting was duly convened, and the resolution is valid: see *In re Union Hill Silver Co., Ld.* (2) and *In re Newcastle United Football Co., Ld.* (3). If all members with registered addresses abroad had to be served before a general meeting could be validly held, the business of a company could not be conducted. Under s. 117, sub-s. 2, of the Companies Act, 1929, at least twenty-one days' notice must be given of a general meeting at which a special resolution is to be passed. In the case of many places abroad, that might involve posting the notices considerably before the twenty-one days commenced to run. In 1898, when the company was incorporated, two meetings were necessary to pass a special resolution, the second being required to be held not less than fourteen days or more than a month after the first. At that date, the only way in which members

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(1) [1945] W. N. 22.

(2) (1870) 22 L. T. 400.

(3) [1932] W. N. 109.

C. A.

1945

WARDEN AND HOTCHKISS, LD., *In re.*

abroad could effectively be given notice of the second meeting was by their being given notice of both meetings at once. It was not then the practice to take that course, and that is an indication that the articles do not envisage service on members abroad. Even if the members in South Africa had been served with notices, almost certainly they would not have attended the meeting, and probably could not even have lodged their proxies in time. [He referred to *Doogan* v. *Colquhoun* (1).] It is submitted that the words " in the ordinary course of the post " in art. 111 mean " in the ordinary course of inland post." The decision of *In re Union Hill Silver Co., Ld.* (2) has stood for seventy-five years and many titles to property must depend on it. Accordingly, whatever view the court might have taken as to the construction of the three articles 42, 109 and 111 in the first instance, they should follow that decision: see the judgment of Lord Esher M.R. in *Dunlop & Sons* v. *Balfour Williamson & Co.* (3) [Scott L.J. referred to the judgment of Lord Esher M.R. in *London Founders Association, Ld. and Palmer* v. *Clarke* (4) and Cohen J. to the speech of Lord Buckmaster in *Bourne* v. *Keane* (5).]

SCOTT L.J. The relevant articles of association of this company, 42, 109 and 111, are in exactly the same terms as arts. 35, 95 and 97 of Table A, in the first schedule to the Companies Act, 1862. In *In re Union Hill Silver Co., Ld.* (2) notice was issued to the shareholders of a general meeting for the purpose of passing a resolution to wind-up the company, voluntarily. The resolution was passed at that meeting and confirmed at a subsequent general meeting. Some of the shareholders were resident in America and consequently could not, in the ordinary course of post, have received notice of either of the meetings as required by s. 52 of the Companies Act, 1862. The court held that this section only applied to shareholders within the jurisdiction and that, therefore, the proceedings were valid. Malins V-C., in the course of his judgment, dealing with this issue, said:—" The petitioner was well aware that the " general feeling of the shareholders was in favour of a volun- " tary winding-up, but, notwithstanding this, he presents a " petition for a compulsory winding-up which can be of no " benefit to any of the parties concerned; and he contends that " the resolutions for the voluntary winding-up were invalid

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(1) [1899] W. N. 148.

(2) 22 L. T. 400.

(3) [1892] 1 Q. B. 507, 518.

(4) (1888) 20 Q. B. D. 576, 581.

(5) [1919] A. C. 815, 874.

" because some of the shareholders, who were in America, did " not receive due notice of the meetings at which those resolu- " tions were passed. This objection is founded on s. 52 of the " Companies Act, 1862, which provides that seven days' notice " of any general meeting must be served upon every share- " holder in the manner specified in Table A of the first schedule " to the Act. Now, if the petitioner's construction of this " section is right, namely that every shareholder must have " notice of a general meeting, no matter in what part of the " world he may happen to be, it is a most inconvenient con- " struction ; because a company cannot, without serious injury " to itself, delay the transaction of important business until " every shareholder in every part of the world has had notice " of the meeting at which the business is to be discussed. " I think that such a construction would be entirely opposed " to the spirit and intention of the Act. It seems to me that " the Act has reference only to shareholders who can be reached " by the ordinary English post, and that, in fact, it was not " necessary to serve these absent shareholders. I am, there- " fore, of opinion that this objection to winding-up the company " voluntarily is unfounded." That decision of Malins V-C. has remained unqualified by any decision of the courts for a very long time. In 1898 this company was registered with the relevant articles of association in precisely the same form as those in *In re Union Hill Silver Co., Ld.* (1). In 1906 the Board of Trade altered these articles in Table A in the first schedule to the Companies Act, 1862, to the form in which they subsequently appeared in Table A in the first schedule to the Companies Act, 1908, and their form to-day in the Companies Act, 1929, is, broadly speaking, the same as that in the Act of 1908. Maugham J. in *In re Newcastle United Football Co., Ld.* (2) followed the decision of Malins V-C. in *In re Union Hill Silver Co., Ld.* (1) There has been no case reversing that decision, and in my view the case before us to-day raises a question of general importance, namely, whether, where an interpretation of a document, instrument or set of rules is doubtful, but one interpretation given some time ago has passed into common acceptance as having a certain meaning, it is desirable to alter this original interpretation, since, to do so, would disturb titles and upset business transactions based on that interpretation. Speaking of commercial documents, Lord Esher M.R., in *London Founders Association, Ld. and*

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(1) 22 L. T. 400.

(2) [1932] W. N. 109.

Palmer v. *Clarke* (1) said (2): "Taking the decision of the "Queen's Bench alone, I do not think that, even if we did not "agree with the reasons they gave, we could nearly forty years "afterwards overrule a decision as to the construction of a "contract in daily mercantile use, which must be taken to have "been the basis upon which all subsequent contracts of the "same description were made." That rule of interpretation has been framed on the Latin tag, communis error facit jus, and there have been several decisions in the House of Lords in which that principle of not disturbing a settled interpretation of documents in common use has been mentioned. In *Bourne* v. *Keane* (3) Lord Buckmaster said: "From these authorities "I collect the following principles as applicable to such a "question. Firstly, the construction of a statute of doubtful "meaning, once laid down and accepted for a long period of "time, ought not to be altered unless your Lordships could say "positively that it was wrong and productive of inconvenience. "Secondly, that decisions upon which title to property depends "or which by establishing principles of construction or other"wise form the basis of contracts, ought to receive the same "protection. Thirdly, decisions that affect the general conduct "of affairs, so that their alteration would mean that taxes "had been unlawfully imposed, or exemption unlawfully "obtained, payments needlessly made, or the position of the "public materially affected, ought in the same way to continue."

I think these authorities state an accepted principle of judicial interpretation of documents which is applicable in the present case, although the interpretation adopted by Uthwatt J., if the matter had been res integra, would have been one that might well have been adopted at the outset, though I express no opinion on that. I think that it would be contrary to principle to alter what must have been the accepted interpretation of these three articles over a long period of time. When this company framed its articles in 1898, it must be taken to have framed them on the basis of that accepted view, and there having been no definite decision that that interpretation was wrong, at this late stage it would be wrong to depart from it.

For those reasons, I think that the appeal ought to be allowed.

MORTON L.J. If this matter had been wholly free from authority, it may well be that I might have agreed with the judgment of Uthwatt J. I appreciate fully the force of the reasons as to the true construction of the articles in question which are put forward by the learned judge, and, for my part, I cannot draw any inference one way or the other from the fact that the articles in question, which were incorporated in Table A in the first schedule to the Companies Act, 1862, were altered in the year 1906. But the matter is by no means free from previous authority. The point at issue was decided by Malins V-C., in 1870, and that decision was followed by Maugham J., in 1932. Further, I think there can be no reasonable doubt that the construction which the learned Vice-Chancellor put upon these articles must have been followed in a very large number of cases. By way of illustration I would refer to the 15th ed. of Palmer's Company Precedents, part I., at the foot of p. 733, where the learned authors say: " It was " long since held by Malins V-C. in *Union Hill Silver Co., Ld.* " (1870), 22 Law Times, 400, that it is not necessary to serve " notice on shareholders who have chosen to reside outside the " United Kingdom. And this rule, being entirely consistent " with common sense and common convenience, has been " acted on ever since."

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(1) 20 Q. B. D. 576.
(2) Ibid. 581.
(3) [1919] A. C. 815, 874.

There can be no doubt that if we were now to say that the decision of Malins V-C. was wrong, we should be upsetting the title to property in a large number of cases. It must be borne in mind that confirmation by the court is required only in a very small minority of the cases in which special resolutions are passed by a company, and I cannot doubt that, relying upon the articles in question, which are part of Table A of the Act of 1862, and relying upon the view expressed by Malins V-C., many companies may have acted upon the view that it was not necessary to send notices to shareholders resident abroad. It seems to me, therefore, that the conditions laid down by Lord Buckmaster in *Bourne* v. *Keane* (1) are directly applicable to this case. The decision of Malins V-C., in *In re Union Hill Silver Co., Ld.* (2), is undoubtedly one on which title to property depends, and it is impossible to say of that decision that it was wrong, and productive of inconvenience. On the contrary, it seems to me that the decision (whatever view one might take of if, if the matter were to come before the court for the first time to-day) was one which was productive of convenience.

Reference was made by Uthwatt J. in his judgment, to the

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(1) [1919] A. C. 815.

(2) 22 L. T. 400.

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practice of the registrar to the court in company matters, and the learned judge says this: " So far as reported authority goes, " the matter rests there "—that is to say, so far as reported authority goes, the matter rests on the decision of Malins V-C. as followed by Maugham J., as he then was. The learned judge proceeds: " But that authority has not been accepted in " practice. Mr. Wilson, the registrar to the court in company " matters, whose experience on questions arising in checking " the evidence as to the due passing of special resolutions " extends over thirty years, informs me that both before and " after the decision in *In re Newcastle United Football Co.,* " *Ld.* (1) the practice in chambers of the companies court " has been to refuse to certify that the special resolution has " been duly passed in cases such as the present. The cases " which the registrar can recall fell generally into two classes: " (1.) cases where the articles were in much the same form as " the present and service on the shareholders with a registered " address abroad was defective in point of time, or entirely " absent; and (2.) cases where the articles authorized service on " those shareholders by posting up a notice in the registered " office, and there had been no such posting up.

" In most of those cases the companies, on being told of the " difficulty, accepted the position and started afresh. With " regard to such of those cases as were brought into court, the " registrar is unable to recall any occasion, other than the " *Newcastle* case (1) where the court accepted the resolution as " duly passed. According to his recollection, authorities were " not cited in the majority of cases, but in some cases authority " was cited.

" I may add that, to fortify himself in dealing with " companies, the registrar to the court kept a collection of his " notes of the cases where questions of service came before the " court. Unfortunately, as a result of enemy action, that " collection has been destroyed. Specific instances cannot be " referred to."

Mr. Wilson, the registrar, is a most experienced official, and I do not for a moment doubt that what he has reported to the learned judge below, and what is reproduced in the learned judge's judgment, is correct, but I think there are certain observations which fall to be made on the information supplied by Mr. Wilson to the judge. In the first place, Mr. Wilson refers to cases in which the articles " were in

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(1) [1932] W. N. 109.

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"much the same form as the present." Unfortunately, owing to the destruction of the records in question, one cannot be sure whether the articles were so nearly in the same form as the present that any reference to them is of assistance. It may be that the difference in wording had something to do with the result. Secondly, the cases in which the articles authorized service on shareholders by posting up a notice, and there had been no such posting up, are not relevant for the present purpose. Thirdly, although apparently there were a number of cases in which "the companies, on being told of the difficulty, "accepted the position and started afresh," that, of course, carries the matter no further. Fourthly, as regards cases which were brought into court, I quite accept that the registrar is unable to recall any occasion (other than that of *In re Newcastle United Football Co., Ld.* (1)) where the court accepted the resolution as duly passed where notice had not been served on shareholders resident abroad. But it seems to me extremely likely that in any case in which objection was raised by the court on that ground, the company thought it wise to take an adjournment and to rectify what might have been an omission by serving the shareholders abroad. It appears to me very unlikely that if, in any case, a judge took a view directly contrary to that of Malins V-C., in *In re Union Hill Silver Co., Ld.* (2), and to the decision of Maugham J., in *In re Newcastle United Football Co., Ld.* (1), there would not have been some report of that decision.

However that may be, a large majority of the special resolutions which companies pass do not come before the court, and the recollection of the registrar, undoubtedly valuable as it is, does not affect this point, that there must have been many cases in which the title to property depended upon the valid passing of a resolution where the resolution never came before the court. In all the circumstances of this case, therefore whatever view we might have taken as to the true construction of these articles if the matter had come before this court for the first time, I agree that it would not be right to treat as incorrect the decision of Malins V-C., which has stood unchallenged for so many years, and which has been followed by Maugham J., feeling, as I do, that that is a decision which, far from producing inconvenience, has been a convenient decision and one which must have been acted upon over and over again. For these reasons I agree that the appeal should be allowed.

(1) [1932] W. N. 109. (2) 22 L. T. 400.

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Cohen J. I agree, and as we are differing from the learned judge in the court below, I would add a few words. The question before us turns, in the main, on the construction of art. 42 of the company's articles of association, which provides: "Seven days' notice at the least, specifying the place, the day, "and the hour of meeting, and in case of special business, the "general nature of such business, shall be given to the members "in manner hereinafter mentioned, or in such other manner, if "any, as may be prescribed by the company in general "meeting." In commenting on that article, Uthwatt J., says that he cannot see any ambiguity or vagueness of expression which enables him "to read into arts. 42, 109, or 111, any "exception excluding from those to whom notice is to be given "members with foreign registered addresses. Throughout all "the other articles, I may add, the expression 'members' "obviously includes all members." I do not think that art. 42 can include all members, because if the company, in exercise of the power to create preference shares which is contained in art. 33 of the company's articles of association, had created preference shares (as they would have been entitled to do) without any right of voting, it might well be that there would be a class of members who would not be entitled to notice. In my opinion the true view is that the article means that notice must be given to all the members who are entitled, on a true construction of the articles, to receive notice. Be that as it may I might have come to the same conclusion as Uthwatt J., had the matter been free from authority, but, on the contrary, there is in the decision in *In re Union Hill Silver Co., Ld.* (1), a definite decision contrary to the view which has been expressed by Uthwatt J., and it is impossible for this court to ignore that decision. Indeed, as Morton L.J., has said, it is a highly convenient decision. I share his view that it has certainly formed the basis of the practice in a number of special resolutions which have been passed since 1870, and that, if we were to hold that that case was wrongly decided, we might be casting doubt on a number of titles to property, and as to the validity of a number of issues of preference shares. It will be enough to refer to s. 234 of the Companies Act, 1929, which reproduces s. 192 of the Companies Act, 1908. That is the section which enables a liquidator, with the sanction of a special resolution, to accept shares as consideration for the sale of property of the company. It might well be that a resolution which has been passed under that section would be invalid if

(1) 22 L. T. 400.

In re Union Hill Silver Co., Ld. (1) were held to have been wrongly decided. I agree entirely with what both my brethren have said that that decision is essentially one which, in accordance with the principles laid down by Lord Buckmaster in *Bourne* v. *Keane* (2), ought to be upheld, whatever our views may be as to the original correctness of the decision.

I would add only one other observation. Uthwatt J., in his judgment, called attention to *In re Anglo-International Bank, Ld.* (3), and said that the articles of association in that case were in substantially the same form as those in the present case, adding that: "it would have been unnecessary either for "Bennett J., or the Court of Appeal, to consider the question "whether the right of shareholders in enemy occupied countries "to receive notice of meetings was suspended by reason of "their enemy status, if residence abroad was of itself a sufficient "reason for not sending them notice." That comment would have considerable force if, in fact, the articles had been in substantially the same form as those in the present case, but the point was never raised in that case, and when one looks at the report, I think, one sees a perfectly good reason for its not being raised. The salient feature in that case was that there was no reference to the "ordinary course of the post." The article in that case, 141, corresponding to art. 111 in this, as appears from the report (4), was this: "Any notice or other "document, if served by post, shall be deemed to have been "served at the time when the letter containing the same is "put into the post office"—so that no possible difficulty could have arisen if one assumes that all members were entitled to receive notice, because foreign shareholders, although in fact they would never have received notice, would be deemed to have received it on the date on which the letter addressed to them was put into the post. I do not think, therefore, that any assistance can really be derived for the view contrary to that which this court is taking from the decision in that case. For these reasons, I agree that the appeal should be allowed.

Appeal allowed. Order of Uthwatt J., discharged. Special resolution confirmed.

Solicitors for the company: *Burton, Yeates & Hart, for Johnson & Co., Birmingham.*

(1) 22 L. T. 400.
(2) [1919] A. C. 815, 874.
(3) [1943] Ch. 233.
(4) [1943] Ch. 234.

C. G. M.

COHEN J.

1945

Mar. 21, 28.

In re CARLTON.

Alien—Naturalization—Foreigner resident in England—" Every child " . . . . shall be deemed to be a naturalized British subject "—Infant children—Cross-heading in statute—Naturalization Act, 1870 (33 & 34 *Vict., c.* 14), *s.* 10, *sub-s.* 5.

The provision of s. 10, sub-s. 5, of the Naturalization Act, 1870, that where a parent has obtained a certificate of naturalization in the United Kingdom, every child who during infancy has become resident with such parent in the United Kingdom shall be deemed to be a naturalized British subject, applies only to children who were under twenty-one years of age at the date of the certificate. This is shown by the cross-heading preceding s. 10, which gives a key to the interpretation of the section.

Toronto Corporation v. *Toronto Railway* [1907] A. C. 315, at p. 324, applied.

ADJOURNED SUMMONS.

The applicant, R. G. Carlton, was born in Roumania in 1887, of parents both born in Roumania, but without Roumanian citizenship. They took up residence in England in 1894, bringing the applicant with them, and he continued to reside with them there until 1912. His permanent residence throughout was in the United Kingdom. On April 18, 1910, the father of the applicant was granted a certificate of naturalization on an application made in 1909. It appeared at the hearing that an earlier application had been made in 1907 which was not granted but was renewed in 1909. The certificate of naturalization was not before the court but the Attorney-General stated that it granted naturalization to the applicant's father and mother and their seven infant children. The applicant on April 18, 1910, was over twenty-two years of age, but he contended that by reason of sub-s. 5 of s. 10 of the Naturalization Act, 1870 (1), he automatically became a naturalized British subject.

The applicant in person :—I have complied with the residential provisions of the Act during infancy. Residence for a minimum period of five years is required. At the date of the original application by my father I was nineteen years of age.

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(1) Naturalization Act, 1870, s. 10 : " The following enactments " shall be made with respect to " the national status of women " and children :— . . . . (5) Where " the father, or the mother being " a widow, has obtained a certificate of naturalization in the " United Kingdom, every child of " such father or mother who " during infancy has become " resident with such father or " mother in any part of the " United Kingdom, shall be " deemed to be a naturalized " British subject."

Sir Donald Somervell A.-G. and *Danckwerts* for the Crown. The common law bases naturalization on birth within the King's dominions. The original Act was intended to provide for children born abroad of British subjects. So far as naturalization is concerned, the first general provision is in the Act of 1844. This particular problem is dealt with in s. 10 of the Naturalization Act, 1870. The word "child" in that sub-section is limited to infant children. "Child" is a word capable of different meanings. In a will "children" normally means the fruit of the marriage. In most contexts, however, the word "child" would mean an infant below the age of discretion—fourteen in the case of a boy, and sixteen of a girl. See *Thomasset* v. *Thomasset* (1). That case shows that "children" in the Matrimonial Causes Acts only applies to boys under fourteen and girls under sixteen. Change of nationality is obviously a matter of importance which every person must arrange for himself, and not cause to be done for him. The certificate usually only applies to those children who were under age at the date when it was granted. The words "during infancy" in the sub-section help this construction of "child"; when applied to persons of full age they obviously do not make sense. Therefore the natural meaning of "child" is "infant," although in certain contexts it may include persons of full age. *Jaffé* v. *Keel* (2) is a case on s. 10, but no direct help is obtainable from any of the authorities.

Cur. adv. vult.

COHEN J. in a written judgment stated the facts, and continued: The determination of the question before me depends on the meaning I place on the words "children" and "child." The applicant, who appeared in person, says that "child" means every son or daughter of the father, or the mother being a widow, as the case may be, that this is the natural meaning of the word "child," and that this construction is fortified by the requirement that the child must have "during infancy become resident "with such father or mother in any part of the United "Kingdom," since if "child" means "infant child" the words "during infancy" would be redundant. The Attorney-General argued that the word "child" is of ambiguous import and that on the true construction of s. 10 it means "infant child." He called my attention to the observations on this subject in Stroud's Judicial Dictionary, 2nd ed., p. 302. Under the heading "Child, Children" appears the following passage: "'Child' is ordinarily a synonym for "infant, a person under the age of twenty-one years, e.g., "'poor child.' So 'children' in the Matrimonial Causes "Acts means children until they attain twenty-one, though an "order for custody (as distinguished from one for maintenance "or education) would only in very special circumstances be "made against the wishes of a child who has attained years of "discretion. But though the idea that a 'child' is one who "has not reached full age runs through all the statutory "definitions, yet, generally, the period of childhood is made to "terminate before the age of twenty-one; e.g., in the Factory "and Workshop Act, 1901, '"child" means a person who is "'under the age of fourteen years and who has not (being of "'the age of thirteen years) obtained the certificate of proficiency or attendance at school mentioned in Part III. of "'this Act'." It is, however, to be observed that in wills, as the Attorney-General admits, the word "child" normally means all sons and daughters irrespective of their age.

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(1) [1894] P. 295.

(2) [1916] 2 K. B. 476.

In my opinion the meaning of the word "child" must in every case depend on the context in which it appears, and I have come to the conclusion that the context in s. 10 indicates that the word "children" or "child" means infant children or infant child. First, it must be borne in mind that a change of nationality involves an important change of status on which a person of full age is entitled to make his own decision. It would be strange indeed if a man of full age were to be liable to have British nationality forced on him as the result of an application made by his father after he came of age, although he might be unaware of the application. It would be stranger still if a British national of full age were to find that by his father's action, taken without his knowledge, he had been made a subject of a foreign state, and deprived of British nationality. Yet such a result might ensue if I were to give to the word "child" the meaning for which the applicant contends. Suppose the following state of circumstances: (1.) that A., a British subject, went to reside in Germany in 1884, taking with him a son aged ten; (2.) that in 1895 that son, being of the age of twenty-one returned to England and took up permanent residence there; (3.) that in 1910 the father applied for and obtained German nationality, the son being unaware of that application; (4.) that German law in 1910 contained a provision similar to s. 10, sub-s. 5. If the applicant's contention be sound, the son would, under sub-s. 3 of s. 10, in the eyes of the English law, against his will, and indeed without his knowledge, have become a German subject and ceased to be a British subject. Secondly, it is to be observed that under s. 7 the minimum period of residence in this country necessary to qualify an alien for naturalization is five years. An adult child could himself apply for naturalization if he satisfied this condition, but not otherwise. Yet if the applicant's contention be right, he could obtain naturalization on application by his parent if he had resided in England during infancy notwithstanding that he had been resident in a foreign state since he attained twenty-one. This again seems to me a result that the legislature cannot have intended.

For these reasons I should have been inclined, even if there were nothing more, to hold that in its context in s. 10 "child" means "infant child." But the matter is I think placed beyond doubt by the cross heading "National status of "married women and infant children." If I can give any weight to this cross heading, all possible doubt is removed. How much weight then ought I give to the cross heading? In *Inglis* v. *Robertson* (1), where the documents of title to goods had been pledged by someone who was not a mercantile agent, the pledgee sought to rely on s. 3 of the Factors Act, 1889, which is in these terms: "A pledge of the documents of title "to goods shall be deemed to be a pledge of the goods." The language of the section is quite general, but it appears in a group of sections headed "Dispositions by Mercantile Agents" and the House of Lords held that s. 3 only applied to pledges by mercantile agents. Lord Halsbury L.C. said (2): "I cannot "doubt that each of the sections included in this separate "portion of the statute must be read as only applicable to the "cases of persons indicated by that separate part of the statute; "and, if so, it seems to me that the case is free from doubt, "since under the circumstances of this case there was no "disposition by a mercantile agent." Again, Lord Herschell said (3): "The section mainly relied on is the third, which is

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(1) [1898] A. C. 616.
(2) Ibid. 624.
(3) Ibid. 629.

"in these terms: 'A pledge of the documents of title to goods "'shall be deemed to be a pledge of the goods'." Then, after finding that there was a pledge he goes on: "I think the "enactment has no application to the present case, inasmuch "as the pledge was not a disposition by a mercantile agent, and, "in my opinion, it is to such dispositions only that the section "applies. It is true that it is general in its terms, but it is one "of a group of sections headed 'Dispositions by Mercantile "'Agents.' The Act is divided into parts. The first, headed "'Preliminary,' consists of a definition clause. The last part, "headed 'Supplemental,' contains provisions as to the mode of "transfer 'for the purposes of this Act,' and certain savings. "The other two parts are headed respectively 'Dispositions "'by Mercantile Agents,' and 'Dispositions by Buyers and "'Sellers of Goods.' These headings are not, in my opinion, "mere marginal notes, but the sections in the group to which "they belong must be read in connexion with them and "interpreted by the light of them. It appears to me that the "Legislature has clearly indicated the intention that the "provisions of s. 3 should not be treated as an enactment "relating to all pledges of documents of title, but only to those "effected by mercantile agents."

The Attorney-General very properly pointed out that Lord Herschell's language might be interpreted as meaning that the cross-heading was a part of the statute, whereas according to Parliamentary procedure cross-headings, like marginal notes, cannot be the subject of amendments: but he suggested that cross-headings could properly be used at least to the extent indicated in the Privy Council by Lord Collins in *Toronto Corporation* v. *Toronto Ry.* (1). His Lordship said: "This "clause is the last of a fasciculus, of which the heading is "'Track, etc., and Railways,' and, as was held in *Hammersmith Ry. Co.* v. *Brand* (2), such a heading is to be "regarded as giving the key to the interpretation of the clauses "ranged under it, unless the wording is inconsistent with such "interpretation." I respectfully agree with this statement of the law. Applying the principle thus laid down to the present case, the expression "children" is of ambiguous import, it may mean all children or it may mean children under twenty-one. The cross-heading removes the ambiguity and makes it clear that in sub-s. 5 "child" means child under twenty-one. The applicant was over twenty-one on the date on which his father obtained a certificate of naturalization. That must be the material date for the purpose of determining whether an infant child has become naturalized under s. 10, sub-s. 5. Accordingly, while I feel some sympathy with the applicant, it is clear to me that he is not entitled to the relief he seeks and the application must be dismissed. It was agreed between the parties that I should make no order as to costs.

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(1) [1907] A. C. 315, 324. (2) (1869) L. R. 4 H. L. 171.

Solicitor for the Crown : *The Treasury Solicitor.*

H. L. L.

Re COCHRANE'S SETTLEMENT TRUSTS.

COCHRANE *v.* TURNER.

C. A.
1945
Mar. 7, 8, 9, 12, 22.
Scott and Morton L.JJ., Cohen J.

Revenue—Estate duty—Marriage settlement—Income of trust fund settled by husband payable to wife for life to be expended in current household expenses—On wife's death income to settlor for life—Income used during joint lives by wife for personal expenditure—Interest "reserved " . . . . by implication to the settlor"—Release or abandonment thereof—Death of settlor—Liability to estate duty—Finance Act, 1894 (57 & 58 *Vict., c.* 30), *s.* 2, *sub-s.* 1 (*c*)*—Customs and Inland Revenue Act,* 1881 (44 *Vict., c.* 12), *s.* 38, *sub-s.* 2 (*c*).

A marriage settlement made in 1884 provided that the trustees of a fund settled by the husband should hold the fund in trust to pay the income to the wife for life and after her death to the husband for life, and after the death of the survivor in trust for children. It was also provided that the income so payable to the wife during her life " shall be expended by her in current household expenses " and management." The husband died in November, 1941, and the wife six months later. Throughout the whole period of fifty-seven years of their married life the wife, with her husband's acquiescence, in fact spent the settled income entirely on herself.

It was contended by the Crown that estate duty on the husband's estate in respect of the trust fund was payable on his death as property passing under the settlement " whereby an interest in " such property for life or any other period determinable by " reference to death, is reserved either expressly or by implication " to the settlor," within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889 :—

Held, that an interest in the trust fund was reserved to the settlor in that his liability to pay the current household expenses would be lightened by the said provision; secondly, that such interest was for the settlor's life, and thirdly, that the settlor's omission to enforce the said provision did not constitute a release or abandonment of the said interest, and, consequently, that estate duty was payable.

Decision of Uthwatt J., ante p. 140, affirmed.

APPEAL from Uthwatt J.

By a marriage settlement, dated September 23, 1884, it was provided that the trustees of a fund settled by the husband, the income of which amounted to approximately 400*l.* a year, should hold the fund in trust to pay the income to the wife for life, and after her death to the husband for life if he survived her, and that, after the death of the survivor, they should hold the fund in trust for all the children of the marriage. It was also provided that the income payable to the wife during her life "shall be expended by her in current household "expenses and management." The husband died on November 22, 1941, and the wife died six months later. During the fifty-seven years of their married life the wife had no separate fortune and no source of income other than the settlement, and the husband, who was a wealthy man, maintained a large establishment, spending approximately 3,000*l.* a year on household and outdoor expenses. Throughout the whole period the wife, with her husband's acquiescence, spent the settled income entirely on herself. The Crown claimed that the settlement conferred on the husband an interest in the trust fund for his life, and that estate duty became payable on his death under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894 (1).

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(1) Finance Act, 1894 (57 & 58 Vict, c. 30), s. 2: "(1.) Property passing on the death of "the deceased shall be deemed to "include the property following, "that is to say:—. . . . (*c*) "Property which would be required "on the death of the deceased to "be included in an account under "s. 38 of the Customs and Inland "Revenue Act, 1881, as amended "by s. 11 of the Customs and Inland Revenue Act, 1889, if those "sections were herein enacted and "extended to real property as "well as personal property . . . ."

By Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889): "The real and personal or movable property to be "included in an account shall be "property of the following "descriptions . . . . (*c*) Any "property passing under any "past or future settlement (in"cluding any trust whether ex"pressed in writing or otherwise) "made by any person dying after "such day by deed or any other "instrument not taking effect as "a will, whereby an interest in "such property, or the proceeds

An originating summons was taken out by the trustees of the settlement for the determination of that question.

Uthwatt J. held that estate duty was payable on the death of the husband in respect of the fund (1). The trustees appealed.

Roxburgh K.C. and *H. A. Rose* for the trustees. The question is whether an interest in the trust fund passing under the settlement was reserved either expressly or by implication to the settlor within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which was construed in the Irish case *In re Cochrane* (2). The judgment of Uthwatt J. was wrong, in the first place because no interest in the fund was reserved to the settlor, secondly, because if an interest was so reserved it was not reserved for his life or for any period referable to his death, and thirdly, if so reserved, it was only an equitable interest, released or abandoned by the settlor by his conduct more than three years before his death. The clause in the settlement that the income " shall be expended by her in " current household expenses " is not limited to the lifetime of the settlor, and in fact did operate after his death. The words show that the obligation should continue during the whole time the wife received the income, namely, for her life. The intention of the clause was to prevent the wife spending the income on fripperies. It did not oblige the wife to spend the money on objects selected by the settlor; it only circumscribed her right of selection. Uthwatt J. construed the words " current household expenses " as if preceded by the word " joint." The settlor did not intend to prevent the wife from being the beneficial owner and make her a trustee of the money. The principle to be applied is that applied in *In re Rogers* (3). The settlor, assuming that the settlement reserved an interest in the fund, had abandoned or released that interest to the wife, the principle applicable being as stated by Baggallay L.J. in *In re Cross* (4) where he said: " There is no doubt but that in a case in which the conduct " of the parties permits of such a view being taken the court

" of sale thereof, for life or any " other period determinable by " reference to death, is reserved " either expressly or by implication to the settlor, or whereby " the settlor may have reserved " to himself the right, by the " exercise of any power, to restore " to himself, or to reclaim the " absolute interest in such property or the proceeds of sale " thereof."

(1) Ante p. 140.

(2) [1905] 2 I. R. 626.

(3) [1944] Ch. 297, 301.

(4) (1882) 20 Ch. D. 109, 122.

C. A.
1945

Cochrane's Settlement Trusts, *In re*.
Cochrane *v.* Turner.

"will presume from their conduct that they intended to "abandon a right which, but for such abandonment, they "would have been at liberty to enforce." Here the conduct of the parties shows that the right was intended to be abandoned. During fifty-seven years of married life the wife did not apply the income as directed nor did the settlor attempt to force her to do so. The only interest he had in the fund was a reversionary interest if he survived his wife, but he did not survive her. Estate duty was not payable until her death, and then it was payable on her estate.

J. H. Stamp for the Crown. The trust was created in order to confer a financial benefit on the settlor as well as on the wife, for the income was to be expended on the expenses of the husband's establishment during the joint lives, to that extent lightening the burden on his purse. That gave him a right of property in the fund—see *Sutton* v. *Inland Revenue Commissioners* (1). It was a trust, and the wife was a trustee. It was an interest for his life either as a beneficiary during the wife's lifetime or as having a reversionary interest on her death. A person does not abandon a right of property by merely doing nothing, unless thereby (i.) he induces someone else to change his position to his prejudice, or (ii.) a statute of limitation applies, or (iii.) the time which has expired enables the court to infer an actual release and not merely an intention to release—*Stackhouse* v. *Barnston* (2), *Blake* v. *Gale* (3), *In re Dixon* (4).

Roxburgh K.C. in reply referred to *Swan* v. *Sinclair* (5).

Cur. adv. vult.

Mar. 22, 1945. Morton L.J. read the judgment of the court: This is an appeal by the trustees of a marriage settlement, and a beneficiary under that settlement, from a decision of Uthwatt J., in favour of the Crown. On September 23, 1884, a settlement was executed in contemplation of the marriage, shortly afterwards solemnised, between Alfred Ormsby Cochrane and Adelaide Sophia Coleman. At the date of the settlement Mr. Cochrane (hereinafter called "the "husband") was a widower with two children, and Miss Coleman ("the wife") was a spinster. The settlement was

(1) (1929) 45 T. L. R. 565.
(2) (1805) 10 Ves. 453.
(3) (1886) 32 Ch. D. 571.
(4) [1900] 2 Ch. 561, 580.
(5) [1924] 1 Ch. 254.

made between the husband of the first part, the wife of the second part, and two trustees of the third part. It recited the intended marriage, and recited that upon the treaty for the intended marriage it was agreed that certain investments should be settled by the husband, and that these investments had been transferred into the joint names of the trustees. It was agreed and declared that after the intended marriage the trustees should hold the trust fund upon trust to pay the income thereof to the wife during her life, and after her death to pay the income thereof to the husband, if he should survive the wife, for his life, and that after the death of the survivor of the wife and husband the trust fund should be held in trust for all the children of the husband, whether of the intended marriage or any other marriage, who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age, in certain proportions. Next came certain powers of maintenance and advancement, and an ultimate trust of the capital for the husband in an event which did not happen. Then came the following words " And it is also agreed and declared that the " income arising from the said trust fund to be paid by the " trustees or trustee to the said Adelaide Sophia Coleman " during her life shall be expended by her in current household " expenses and management." We shall refer to this agreement and declaration as " the income provision." The remainder of the settlement is not material for the present purpose.

The income provision is a most unusual one. No member of the court, and no one of the counsel engaged in this case, had ever seen such a provision in any marriage settlement, and we were told that it does not occur in any of the well-known books of precedents. It looks as if the husband, while he was willing to give the first life interest to the wife, desired to ensure that the income paid to her would be applied in payment of expenses which would ordinarily fall upon him. This may well have been a prudent provision at the time, but it is this part of the settlement which has given rise to the questions before this court. The husband died on November 22, 1941, and the wife died on May 2, 1942. It is contended by the Crown that estate duty became payable in respect of the trust fund on the death of the husband under s. 2, sub-s. 1 (*c*) of the Finance Act, 1894, and that contention succeeded before Uthwatt J. Thereunder property passing on the death of the deceased shall be deemed to include property passing under any instrument not taking effect as a will " whereby an interest " in such property, or the proceeds of sale thereof, for life or " any other period determinable by reference to death, is " reserved either expressly or by implication to the settlor."

The questions argued before us were (1.) Was an interest in the trust fund reserved to the husband by the marriage settlement ? (2.) If so, was an interest in the trust fund reserved to the husband for life or any other period determinable by reference to death ? (3.) If so, was such interest released or abandoned by the husband at any time before his death ? There is no doubt that estate duty became payable in respect of the trust fund either on the death of the husband or on the death of the wife, but the duty payable will be very much larger if it is payable on the death of the husband, because the rate of estate duty payable in the case of the husband's free estate is much higher than that payable in respect of the free estate of the wife. The difference between the duty payable if the trust fund is aggregated with the husband's free estate, and the duty payable if the trust fund is aggregated with the wife's free estate, is a sum of over 4,000*l.* Accordingly, it is in the interest of the Crown to contend that the property passed on the death of the husband.

To answer the first two questions, it is necessary to construe the settlement, and in particular the income provision. In our judgment the effect of the income provision is to make the wife a trustee of each sum that is paid to her by the trustees in respect of the income of the trust fund, as and when she receives it. The provision imposes a trust upon her to expend the whole of each such sum in " current household expenses and " management." The ambit of expenditure is reasonably well defined by these words, and if any doubt were to arise whether any particular expenditure was or was not within the words " current household expenses and management," such question could and would be determined by the court. Does the existence of this trust give the husband an interest in the trust fund ? Uthwatt J. thought that it did, and we agree with him. It is, of course, quite clear that an interest in the income of property can be an interest in such property within the meaning of the sub-section now under consideration, and the husband had a right to require that the wife should apply the income of the trust fund for a purpose which would wholly or partly relieve the husband of a liability, namely, the liability to pay household expenses and management. In *Tennant* v. *Lord Advocate* (1) Lord Russell of Killowen, dealing with s. 4 of the Finance Act, 1894, said: "The word 'interest' is "a word capable of wide meaning, and I see no valid reason for "limiting its scope in s. 4, as was suggested in the course of the "argument."' In *Attorney-General* v. *Farrell* (2) it was held that a re-settlement made by Major Alfred Stourton and his mother under a joint power was a settlement within the meaning of the sub-section now under consideration, and that as Major Stourton was one of the objects of a discretionary trust of income under that resettlement, there was reserved to him an interest in the property settled. The interest of the settlor in the trust fund in the present case is a substantial one; much more substantial, in our view, than the interest of Major Stourton in *Attorney-General* v. *Farrell* (2). In the latter case it was quite possible that Major Stourton would receive no income at all, while in the present case it was expressly provided that the whole of the income should be dealt with in the manner which we have mentioned in relief of the husband.

We must now consider whether the interest reserved to the husband was reserved for his life or any other period determinable by reference to his death. We insert the word "his" before "life" and before "death," because it is clear that the words "life" and "death" in the sub-section mean the life and death respectively of the settlor—see *In re Cochrane* (3). In our judgment this question must be answered in the affirmative. We heard considerable argument on the question whether the income provision was effective only during the joint lives of the husband and the wife, or whether it would continue to be binding on the wife after the death of the husband. Uthwatt J. thought that the former was the correct view. He held that the current household expenses referred to were the current household expenses of the matrimonial home and must be limited to expenses of the kind specified arising during the joint lives of the parties. We feel some difficulty in accepting this construction, having regard to the fact that the provision is expressed as applying to the income to be paid by the trustees to the wife "during her life," but it is unnecessary for the purpose of this appeal to express a concluded view whether the wife continued to be bound by this provision after the death of the husband. However this may be, it is clear that the " interest " of the husband in the trust fund under the income provision came to an end on his death. It is true that if the husband had survived the wife that interest would have ceased while the husband was still living; but in that event the husband would at once acquire on the death of his wife another interest in the income by virtue of the reversionary life interest reserved to him by the settlement. Thus it was certain, from the time when the settlement was executed, that the husband would have an interest in the trust fund during the whole of his life. If he should predecease the wife, that interest would remain unchanged during his life. If he should survive the wife, that interest would be changed from an interest under the income provision to an ordinary life interest. We agree with the observation of Uthwatt J. (1): " In one way or another the interest attached " to the whole settlement income during the husband's life. " The possible change in its character during the husband's " life is, in my view, immaterial." Further, the interest which the husband was enjoying immediately prior to his death, whether under the income provision or by reason of his reversionary life interest, was bound to end at his death.

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(1) [1939] A. C. 207, 213.
(2) [1931] 1 K. B. 81.
(3) [1905] 2 I. R. 626, 634.

The result is that estate duty must be payable on the death of the husband unless it is established, the burden of proof being on the appellants, that the interest of the husband was abandoned or released by him. The evidence on this point is contained in the joint affidavit of the trustees. It is clear that from 1918 onwards and possibly from a much earlier date, the whole of the income of the trust fund, amounting on the average to about 400*l.* per annum, was paid into a " B " account in the name of the wife, and was used by the wife, not in accordance with the income provision but exclusively for her own private purposes, such as dress and other personal expenditure. This fact, and other facts to which we need not refer in detail, were relied upon by the appellants. No express release or abandonment by the husband, either oral or in writing, was proved, but the appellants invited this court to draw the inference that there had been such a release or abandonment.

In our view the facts proved are insufficient to make it right for this court to draw that inference. All the facts proved are equally consistent with the view that the husband, while acquiescing year by year in such user of the income,

(1) Ante p. 145.

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retained his right to object in any future year, though he did not choose to assert his right in any year prior to his death. It was very natural that the husband, who appears to have been prosperous during his life, should allow the wife year by year to use the income of the trust fund for her personal expenditure. The evidence is that the wife had no income of her own, and if the husband had not allowed this user of the trust income, he would naturally have thought it right to supply his wife with an allowance for her personal needs from some other source. We find nothing in the evidence which would preclude the husband in any year from saying to the wife "I have not so far insisted on the performance of the "trust contained in the settlement, but I now insist on the "income of the trust fund being applied this year in or towards "current household expenses and management." As the learned judge put it (1) "His acquiescence contained no "promise as to the future. The sword remained in its sheath. "It was not thrown away."

There being in our view, no release or abandonment by the husband, it is unnecessary to consider s. 59 of the Finance (1909–10) Act, 1910, as amended by s. 43 of the Finance Act, 1940. It is also unnecessary to consider whether the income provision could have been enforced by anyone other than the husband. Uthwatt J. thought not, but we doubt whether this is not too narrow a view of the obligation undertaken by the wife. The result is that the husband thought fit to reserve to himself an interest in the trust fund for the whole of his life, and that the appellants have failed to prove that such interest was released or abandoned at any time prior to his death. This being so, the appeal fails and must be dismissed.

Solicitors for trustees: *Bentleys, Stokes & Lowless, for Belk & Smith, Middlesbrough.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

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(1) Ante p. 144.

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Feb. 28; *Mar.* 1, 22, 28.

In re HEY'S SETTLEMENT TRUSTS.

HEY *v.* NICKELL-LEAN.

Settlement—Will—Construction—Rule against perpetuities—Ultimate gift of capital void—Accruer to other shares on deaths of children without issue—Implication of cross remainders—Resulting trust of surplus income to testator's estate—Surplus income of settled fund asset but not income of testator's estate—Investment as capital.

By a settlement made in 1931 H. settled personal property upon trust to pay out of the income an annuity to each of his children during the lives of himself and his wife and the life of the survivor, and after the death of the survivor to pay the whole of the income to his children in equal shares, the issue of any child dying, leaving issue, to stand in place of such deceased child and take his or her share of the income, and after the death of H. and his wife, and of their last surviving child, whichever event should last happen, upon trust as to capital and income for the respective issues of the children of H. then living, in equal shares per stirpes.

By his will, made in 1938, H. devised and bequeathed his residuary estate in trust for sale and conversion, and to pay the income to his wife for her life and then to his children in equal shares, with power to postpone conversion. In the meantime all income of property producing income was to be treated as income. The rules known as the rules in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137a, and *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295, were expressly negatived. The testator H. died in 1942, leaving surviving him his widow and four daughters, one of whom was married and had two infant children.

On a summons taken out to decide various questions arising on the will and settlement :—

Held, that " children " in the settlement meant all the children of H., including any which might be born after its date and therefore the ultimate gift of capital to the issue of children, after the death of the last surviving child, was void for remoteness ; that in the event of the death, in the lifetime of H.'s widow, of any child of H. leaving issue, the share of income payable to that child was equally divisible between his or her issue ; that in the event of the death in the lifetime of H.'s widow of any such child without leaving issue, the share of income payable to that child (including any accruing share) would accrue to the other shares of such income and be distributed accordingly, the provisions as to substitution and cross remainder being read as separate directions affecting the share of each child and not the whole class of children.

In re Tate [1914] 2 Ch. 182 followed.

Held, further, that on the death of the last survivor of the said children, the capital of the settled fund fell into and formed part of the residuary estate of the testator H., and that surplus income of the settled fund, and its accumulations, not being income of the residuary estate, must be treated as capital and invested.

In re Fisher [1943] Ch. 377 and *In re Payne* (1943) 169 L. T. 365 followed on the last point; *In re O'Hagan* [1932] W. N. 188 not followed.

ADJOURNED SUMMONS.

By a Deed of Trust or Settlement, dated October 1, 1931, and made between Herbert Hey (hereinafter called "the "donor") and Cloyne Securities, Ld. the donor settled a large block of shares of $100 each in a Canadian company. The trustee was to hold the trust fund upon trust during the minority of the donor's son Herbert Matty Hey to pay out of the income thereof the sum of 300*l.* to, or apply the same for the benefit of each of his children, and to accumulate the surplus income. When the son attained the age of twenty-one the trustee was to transfer one-fifth of the trust fund to him for his absolute use and benefit, and as to the balance or as to the whole of the trust fund and accumulations if the son should die under twenty-one upon trust to pay out of the income 300*l.* a year to each of the donor's children during the lives of the donor and his wife and of the survivor of them, and after the death of such survivor to pay the whole of the income of the trust fund to the children of the donor in equal shares during their respective lives, but subject to a proviso—that in case any child should die leaving issue such issue should stand in the place of such deceased child and take per stirpes and equally between them, if more than one, the share of the income of the trust fund which such deceased child would have taken if he or she had lived. After the death of the donor and of his wife, and of his last surviving child, whichever event should last happen, the funds were to be held upon trust as to the capital, income and accumulations of the trust fund for the respective issues of the children of the testator living at the happening of such last event, in equal shares per stirpes. The trustees were to accumulate and invest the surplus income (if any). The settlement was to be construed and take effect under the law of the province of Alberta, Canada. The settlement had now been brought to England. Until 1937 no income was available, but as from then, when the funds were re-invested, there was a considerable income, and an annuity of 300*l.* was now being paid to each of the donor's four daughters.

By his will, dated February 1, 1938, the donor gave all his residuary real and personal estate to his trustees upon trust for

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sale and investment, and to pay the income of such investments to his wife during her life, and after her death on trust for all his children living at his death who should attain 21, or being female, marry, in equal shares, the shares of each daughter being settled upon each of them for life with the usual trusts for their issue. The trustees were to be entitled to retain any shares, securities or other interests so long as they should think fit and to postpone the sale or conversion of any part of the estate, pending which the income of property actually producing income should be applied as from the donor's death as income, and on the other hand no such sale, calling in or conversion or on the falling in of reversionary property no part of the proceeds of sale of such property, should be applied as part income, and the donor expressly negatived the rules known as the rules in *Howe* v. *Lord Dartmouth* and *Allhusen* v. *Whittell* in all their branches.

The donor died on September 24, 1942, leaving his widow, the plaintiff Elizabeth Hey, and four daughters surviving him. His only son mentioned in the settlement died at the age of twenty in 1932. One daughter Mrs. Nickell-Lean was married and had two children. The value of the residuary estate was some 260,000*l.* The summons was taken out by the plaintiff to determine several questions arising on the settlement and the will. Most of these were future questions, but it was desirable to have them all decided, in order to ascertain the values of the parties' interests for the purpose of quantifying their shares of the estate duty payable.

The court decided, in the first place, that there was no difference between the law of Alberta and English law in regard to the construction of the settlement, and secondly that "children" in the settlement referred not only to the donor's children then living, but also to any possible future children, with the result that the ultimate gift of capital to the children's issue was void for remoteness.

The next question argued was as to the destination of the income in the future, in the event of the death of any of the children of the donor, either with or without leaving issue, and whether the rule against perpetuities affected any gift of income.

Winterbotham for the plaintiff.

C. L. Fawell for F. D. Nickell-Lean, an executor and son-in-law of the donor, and Mrs. Nickell-Lean and other daughters of the donor. After the death of the plaintiff the income is distributable between children represented personally or by stocks. *M'Dermott* v. *Wallace* (1). That is to say, if a child should die leaving issue, the issue take her share of the income. If one should die without issue her share of the income would go to the others surviving and the issue of any who had died leaving issue. As a matter of construction " children " here means children living at the date of the settlement and no others. Theobald on Wills, 9th ed., at p. 425. It is " the " children " not " all the children." If that is so there is no breach of the rule against perpetuities. There is no express gift to survivors, but the right of accession on death without issue of a child is inherent in the quality of the original gift. There is one gift, the quantum of which may alter. Alternatively there should be an implication of cross remainders between the children. The principle of *In re Legh's Settlement Trusts* (2) is distinguishable, as there was an express gift to survivors in that case. This is a provision which applies separately to each share and accordingly in the case of children living at the date of the settlement there is no infringement of the rule against perpetuities. On the death of a daughter living at the date of the settlement her share goes over to persons ascertained at that date, i.e., within the limits of the perpetuity period. *In re Russell* (3). *In re Morrison's Will Trusts* (4).

Hunt for a trustee of the settlement, adopted the latter argument. There can be no accruer of an unborn person's share to the shares of those living at the date of the settlement.

Droop for two infant defendants, children of Mrs. Nickell-Lean. I accept the argument of Mr. Fawell, but desire to submit a more limited argument. The case nearest to the present is *In re Tate* (5), a decision of Sargant J. If a daughter dies in the lifetime of the widow, leaving issue, the issue will take during the widow's lifetime. But if the daughter survive the widow and then dies leaving issue, the issue would not take if the rule against perpetuities is infringed. But as each daughter was living at the date of the settlement, the gift in remainder to the daughters' issue is valid, if applied separately. The application to the daughter's share cannot possibly affect the others. *In re Russell* (3), *In re Game* (6).

Pascoe Hayward for W. L. Hey, an executor of the testator. The gift over to the issue of the testator's children is void for remoteness. After the death of one child without leaving issue, that child's share of income goes over to the other children. If one child dies leaving issue the substitution of her issue would be valid. But the share of a child dying without leaving issue cannot go over to the issue of another child. The testator in making this settlement desired to provide for all his children, and the possibility of other children being born to him cannot be excluded. On the true construction of cl. 1 (*d*) to imply cross remainders between the children and their issue would infringe the rule against perpetuities. *In re Hobson* (1) and not *In re Tate* (2) governs the present case. There should be no implication of any cross remainders. *In re Legh's Settlement Trusts* (3).

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(1) (1842) 5 Beav. 142.
(2) [1938] Ch. 39.
(3) [1895] 2 Ch. 698.
(4) [1940] Ch. 102, 107.
(5) [1914] 2 Ch. 182.
(6) [1907] 1 Ch. 276.

Fawell and *Droop* in reply. The decision in *In re Hobson* (1) is distinguishable in the form of the gift over, and should not be followed.

COHEN J. I will reserve judgment on this point.

Cur. adv. vult.

COHEN J. read the following judgment. I have now to consider the meaning and effect of those provisions of the donation in trust, dated October 1, 1931, which are to operate after the death of the survivor of the donor and his wife in the light of my decision that the expression "children" in such provisions includes children born after the date of the donation. The questions involved are future questions, but the executors of the donor desire to settle now the duty payable on any interest which the donor takes by way of resulting trust, and cannot do so unless these questions are decided. I think, therefore, that I should deal with them now. The relevant provisions are as follows: "and after the death "of the survivor of the donor and his said wife (*d*) upon trust "to pay the whole of the income of the trust fund to the children "of the donor (including the said Herbert Maltby Hey) in "equal shares during their respective lives (*e*) provided never-"theless that in case any child of the donor shall die at any "time leaving issue such issue shall stand in the place of such "deceased child and take per stirpes and equally between "them if more than one the share of the income of the trust

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(1) [1912] 1 Ch. 626.
(2) [1914] 2 Ch. 182.
(3) [1938] Ch. 39, 44.

" fund (including the said sums of 300*l.* mentioned in sub-cl. (*c*) " of this clause) which such deceased child would have taken " if he or she had lived (*f*) after the death of the survivor of " the donor and his said wife and of the last surviving child " of the donor whichever event shall last happen upon trust " as to the capital income and accumulations of the trust fund " for the respective issues of the children of the donor living " at the happening of such last event absolutely in equal " shares per stirpes and such issue inter se shall be entitled to " their respective share equally between them if more than " one."

The first point to be observed is that on the strict grammatical construction of these provisions they do not dispose of the share of income of a child dying before the period of distribution leaving no issue. Mr. Fawell did, it is true, argue that it was possible without any implication to construe cl. 1 (*d*) as amounting to a direction to divide the income among the children of the donor for the time being living, subject of course to the substitutionary gift in favour of the issue of a child dying leaving issue him surviving. I cannot so read it. In my opinion, the expression " the children of the " donor " in cl. 1 (*d*) means the children living at the death of the donor and his wife. That being so, the share of income of a child dying without issue before the period of distribution is undisposed of unless I can read the gift as creating a quasi joint tenancy in the income, the joint tenants being the surviving children and the issue of any child dying leaving issue, or I can imply cross-remainders in favour of the surviving children.

The basis on which it has been held that there is no intestacy or resulting trust in this class of case was considered by Parker J. in *In re Hobson* (1). In that case: " Testator gave " the income of his estate, real and personal, to trustees upon " trust to pay and divide the same equally between and amongst " S., the daughter of C. and thirteen other named persons " during their respective lives and, if any of them should die " leaving children them surviving, directed the share of income " payable to the parent to be divided equally amongst his, her, " or their children, and from and after the death of the survivor " of the said thirteen other named persons (the name of S. " being omitted) upon trust to sell the whole of his trust estates " and divide the proceeds equally amongst such of the children

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(1) [1912] 1 Ch. 626.

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" of the said C. and thirteen other named persons (the name of " S. being again omitted) as might be living at the death of " the last survivor of them, or, if any of them were dead " leaving children them surviving, then amongst their children, " such children to take their parent's share equally between " them. Two of the thirteen named persons died in the " testator's lifetime without leaving children :—*Held*, that " there was an intestacy as to these two shares of income down " to the period of distribution." Parker J. said (1): " It " appears that two of the named persons died in the testator's " lifetime without leaving children, and I am asked to imply a " gift of their shares of income down to the time of the ultimate " division of the capital of the estate in order to avoid an " intestacy. In my opinion it is quite clear on the authorities " that where there is a gift equally between A., B. and C. " during their respective lives and after the death of the " survivor of them the whole property is given over, the " court has implied an intention on the part of the testator " that the survivors or survivor of A., B. and C. shall after " the death of one or more of them be entitled to the whole " income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. " In the first place and in the earlier cases the judges have said " that a gift in equal shares during their respective lives only " prima facie creates a tenancy in common, and that, if the " court can gather an intention on the face of the will that the " tenancy was intended to be not a tenancy in common but a " joint tenancy, it will treat the words 'in equal shares' or " other similar words as not destructive of what would otherwise " be a joint tenancy; and that interpretation is one which " would in the ordinary course lead to the desired effect. " On the death of A., for instance, B. and C. would continue " to be joint tenants of the whole, and on the death of B., C. " again would become tenant of the whole. That is one way " of meeting the difficulty and of avoiding an intestacy; " but in other cases the rule has been rested on different grounds " in this way. It has been said that where there is a gift to " A., B. and C. equally during their respective lives, and after " the death of the survivor over, an intention is manifested " that A., B. and C., or such of them as shall be living for the " time being, shall enjoy the property down to the period of " distribution, and that the best way of effecting that intention

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(1) [1912] 1 Ch. 631.

" is to imply a gift over on the death of any of them or his or " her share as well original as accruing to the survivors or " survivor; and some of the cases have, I think, been decided " on what I may describe as a mixture of those two theories."

It will be observed that in that case, as here, there was a substitutionary gift in favour of issue though the gift in that case was not of the share of income which the parent would have taken if living but only of the share of the income payable to the parent dying, with the result that the issue could not benefit by any subsequent accruer. Dealing with the joint tenancy argument, Parker J. said (1): " In the first place it appears to " me that I cannot give effect to any intention which I can " fairly presume on the part of the testator by construing this " gift as creating a joint tenancy. The effect of so doing would " be this. If I were to hold that the fourteen named persons " were entitled as joint tenants and not as tenants in common, " then, on the death of one of them leaving issue, by the very " words of the will the joint tenancy would be severed so far as " his or her share was concerned, and the joint tenancy which " originally existed between all of them would continue to " exist only between the other original takers, and so on, as " any one or more of them died leaving issue. The result would " be that on the deaths of those who died without issue the " persons to take would be the persons still alive and the stocks " of those who had died would be excluded."

These observations, with which I respectfully agree, are in point in the present case, and I cannot see my way to implying a joint tenancy or quasi joint tenancy. Parker J. also refused to imply a gift to survivors, saying (1): " In the next place, let " me look at it from the other point of view and see if I can " arrive at a satisfactory result by the implication of a gift to " the survivors. In this case it appears to me that, in order to " carry out any intention which I can fairly presume on the " part of the testator, I should have to imply not an ordinary " gift over on the death of any one of the first takers to the " others, but I should have to say further that, contingently " on any one of them dying without issue, his or her share " was to go, not to the survivors in the ordinary sense of the " word, but to the survivors in a modified sense of the word, " construing it as including survivorship by stocks. In that " case, on the death of one of the first takers without leaving " issue after the death of another leaving issue, the issue of the

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(1) [1912] 1 Ch. 632.

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"one who had previously died leaving issue would be entitled "to a share as representing his parent, his parent being considered to have survived by reason of the survivorship of the "stock. I am by no means clear, however, that the word "'survivor' could be properly construed in that way, though "no doubt an express limitation might be so framed as to "produce that effect. But in any case the gift which I am "asked to imply appears to me to be different from any other "gift by implication which I can find in the books. Moreover, "so far as I am aware, the cases in which gifts of this nature "have been implied have been confined to cases in which the "gift over is on the death of the survivor of all the first takers, "while in the present case the gift over is not on the death of "the survivor of all the first takers, but on the death of the "survivor of thirteen out of the fourteen first takers. In the "next place, I can find no case in which the implication has "arisen where provision is made for the persons entitled under "the ultimate gift over, or some of them, during the lives of "some of the first takers where others have died."

On the other hand, in *In re Tate* (1) Sargant J. implied cross-remainders notwithstanding a substitutionary gift in favour of issue. In that case: "Testator specifically devised "certain real estate in trust to pay the income arising therefrom "amongst his children in equal shares during their lives, or "to their issue in case any of them should die before the "others of them, and from and after the decease of all his "children then in trust to sell the same and to divide the "proceeds between his grandchildren in equal shares per stirpes, "and not per capita; and devised his residuary real and "personal estate in trust to sell the same and hold the proceeds "in trust for his wife and three children. The testator died in "1910, leaving three children him surviving, Elijah, his heir-at-"law, who was still living; Emile, who died in 1910, leaving "one child; and Frances, who died in 1911 without issue:— "*Held*, that on the true construction of the will during the "remainder of Elijah's life Elijah and the child of Emile were "entitled in equal shares to Frances' one-third share of "income."

In re Hobson (2) was not cited in *In re Tate* (1), and at first sight it is difficult to reconcile *In re Tate* with some of the reasons given by Parker J. in *In re Hobson*. But before I deal with that, I should first refer shortly to the reasons Sargant J.

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(1) [1914] 2 Ch. 182.

(2) [1912] 1 Ch. 626.

gave for his judgment. He said (1): "The real question is "whether on the language of the will there is a sufficient "indication of an intention on the part of the testator to create "what I may call cross-remainders between the three children, "including the issue of any deceased child. If the words had "been such as they are, only omitting the substitution of the "issue of a deceased child for his or her parent, there is, in my "opinion, ample authority to shew that cross-remainders for "life would have been implied between the children. I need "only refer to *Armstrong* v. *Eldridge* (2), *Pearce* v. *Edmeades* (3), "and *In re Richerson* (*No.* 2) (4), where Chitty J.'s decision "in Chambers was afterwards confirmed by him in court. "That being so, is there any difference in the present case "because of the words substituting issue for a deceased parent? "In my opinion there is no difference. I think that the "testator is intending that the property shall be kept together "as a whole until the death of the survivor of his children and "that the income shall go amongst the children who survive "either by themselves or by their respective issue, the issue "being substituted for his or her parent. It is clear that they "are so substituted for the parents in respect of original "shares, and if so I see no reason why they are not equally so "substituted in respect of an accruing share given over by way "of cross-remainder. Otherwise there would be a hiatus, "which seems to me contrary to the general intention of the "testator which he has sufficiently indicated that the children "or issue of the children shall together take all the income of "the estate, and that on the death of the survivor of the "children the whole property shall go amongst their children."

Turning to the question of reconciling *In re Hobson* (5) and *In re Tate* (6), it is to be observed that in *In re Hobson* the ultimate distribution was to take place not on the death of the last survivor of the life tenants but on the death of the last survivor of thirteen out of the fourteen life tenants and that, as I have already pointed out, the substitutionary gift could, having regard to the words of the will, only operate on the share of income which the deceased parent was actually receiving at the time of his death. These two differences are sufficient to make the actual decision in *In re Hobson* (5) consistent with that in *In re Tate* (6). I respectfully agree with the reasoning in

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(1) [1914] 2 Ch. 185.

(2) (1791) 3 Bro. C. C. 215.

(3) (1838) 3 Y. & C. Ex. 246.

(4) [1893] 3 Ch. 146.

(5) [1912] 1 Ch. 626.

(6) [1914] 2 Ch. 182.

In re Tate, which is in my opinion applicable to the provisions of the donation before me.

I have next to consider the application of the rule against perpetuities to the dispositions in the donation as I have construed them. Mr. Pascoe Hayward, for the executors of the donor, relied on a passage in the judgment of Warrington J. in *In re Game* (1), where his Lordship said: "We all know that "if a fund is given on trust for a class, some of the members of "which may by possibility attain vested interests in it after "the period limited by the rule against perpetuities, the gift is "void not only as regards them, but also as regards all the "members of the class. The principle is that you cannot "ascertain the share of any member of the class without taking "into account the members born after the expiration of the "legal period; the rights of all the members of the class would "be affected by the consideration whether or not some of them "were born within the legal period." Mr. Pascoe Hayward did not suggest that the original gift of a life interest in sub-cl. (*d*) was bad since the persons entitled to participate would be ascertained on the death of the wife, who was a life in being at the date of the donation. But he argued that on the construction I have placed on the gifts it should be read as a gift to the children and the survivors or survivor of them with a substitutionary gift in favour of the issue of any child dying leaving issue. But the gift to the survivors was contingent and since it might not vest within the prescribed period, the so-called cross-remainders were void. He relied on *In re Legh's Settlement Trusts* (2). In that case the headnote reads: "When in exercise of a special power of appointment a testator "makes an appointment of a share of personalty to two objects "of the power for their joint lives and after the death of "either of them to the survivor for life and they were not lives "in being at the date of the creation of the power of appoint-"ment, the reversionary life interest of the survivor is a con-"tingent interest and therefore void as contravening the rule "against perpetuities." He called my attention to the observations of Greene M.R., where he said, referring to the rule (3): "The rule is strict and highly technical in its "operation and the temptation to construe words in such a "way as to exclude its application is one which must be "firmly resisted."

(1) [1907] 1 Ch. 276, 280.
(2) [1938] Ch. 39.
(3) Ibid. 44.

Mr. Fawell, Mr. Wilfrid Hunt and Mr. Droop, on the other hand, contended that the provisions, express or implied, for substitution and cross-remainder must be read as separate directions as to the share of each child. So read, they said that the authorities clearly established that those provisions would be valid as regards the share of any child born at the date of the donation, and, therefore, since all the children were in fact born at that date, there was no resulting trust. I think it will be sufficient if I refer to *In re Russell* (1). In that case " A testator gave his residuary estate in trust, after the death " of M. and her husband, for all the daughters of M. who should " attain twenty-one or marry under that age ; with a proviso " that the share of any daughter should be held upon trust for " her life, and after her death upon similar trusts for her " children as were thereinbefore declared for the children of M. " M. had one daughter only, the plaintiff, who attained twenty-" one, and she was born in the lifetime of the testator :— " *Held* (affirming the decision of Chitty J.), that the proviso " for re-settlement of the shares must be construed as applicable " to each share separately ; and that although it would have " been void for remoteness in the case of daughters born after " the death of the testator, it was valid in the case of the plain-" tiff, and therefore she was only entitled to a life interest in " the fund." Rigby L.J., in delivering the judgment of the court, said (2) : " It is suggested that the proviso for the " settlement of the shares which I have read is void for remote-" ness, inasmuch as there might have been a daughter of Mary " Dorrell born after the testator's death who would live to take " a vested interest, and whose children would not necessarily " attain twenty-one within the period allowed by law for the " postponement of the vesting of a benefit. No doubt, in the " case of such a daughter, the settlement over directed by the " proviso would have been void ; but it would be perfectly " good as to the interest taken by the plaintiff, who was alive " at the testator's death, unless the possible operation of the " proviso with reference to the share of a daughter not in " existence at the testator's death make the whole proviso void. " Looking at the state of things at his death, it was then clear " that the plaintiff must take either the whole or a share, and " other daughters of Mary Dorrell might come in and take " shares. Assuming them to do so, yet the share of the plaintiff " and the shares of such other daughters would be perfectly

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(1) [1895] 2 Ch. 698.

(2) Ibid. p. 702.

"separate and distinct, and completely ascertained and "separated within the limits of vesting allowed by the law. "The proviso in no way mixed them up, but operates separately "upon each share. The settlement of the plaintiff's share "directed by it is perfectly legal, and would have been so even "though there were other shares to which the proviso could "not legally apply."

The question which of these alternative views should prevail depends upon the exact effect of the implication which, on the authority of *In re Tate* (1), I have thought it right to make. Mr. Pascoe Hayward urged me to bear in mind the observations of the Master of the Rolls in *In re Legh's Settlement Trusts* (2), to which I have already referred, but I am not dealing with an express provision of a written document. I have, in effect, to rewrite the will to give effect to the implication of so-called cross-remainders. On the whole, it seems that the implication of a separate direction as regards the share of each child fits in best with the scheme of the donation. The substitutionary gift operates separately on the share of each child dying leaving issue, and I think that the clause should be read as a gift of the income to the children as tenants in common in equal shares for their respective lives with remainder as to the share of each child.

I turn now to sub-cl. (*f*), which deals with the ultimate distribution. It was admitted that this gift is void, since it is clear that some of the beneficiaries might not obtain a vested interest after the period permitted by the rule against perpetuities. I should like the assistance of counsel in framing the order which on this basis I should make, but as at present advised it seems to me I should declare: That as from the death of the plaintiff each of the children if then living is entitled to a one-fourth share in the income of the said fund for life. That as from the death of any child, whether before or after the death of the plaintiff, such child's issue (if any) will be entitled to the share which her parent if living would have taken, but if she dies without issue her share will thenceforth be divisible among the surviving children and the issue of any child then dead leaving issue, such issue taking equally between them if more than one the share which such child would have taken if *she* had lived. That after the death of the last survivor of the plaintiff and the said four children the capital income and any accumulations of the fund are held upon trust for the executors of the will of the donor.

(1) [1914] 2 Ch. 182. (2) [1938] Ch. 44.

On February 28 and March 1 and 22 the question as to the destination of the surplus income during the lifetime of the widow, and whether it should be treated as income or capital, was argued.

Winterbotham for the testator's widow.

The testator had an interest par autre vie in this income, which would have been sold but for his exclusion of the rule in *Howe* v. *Lord Dartmouth* (1). It is income of a fund producing income, but only for a limited period. The case is very much like *In re O'Hagan* (2), a decision which should be followed. But it was not followed in *In re Fisher* (3) and *In re Payne* (4). The facts in both those cases distinguish them from the present. In the former it could not be said that there was any property producing income. As was there said, what was claimed to be income was not the fruit of any tree. And see *In re Hollebone* (5), where Eve J. refused to treat the whole of the assets received as capital. There was property producing income here, which has resulted as income to the testator's estate, and it is directed to be treated as income, and not as capital. In such a case as this, where the rule in *Howe* v. *Lord Dartmouth* (1) has been expressly excluded, the tenant for life is entitled to enjoy as income the income of any property actually producing income. An estate per autre vie like this is property of the testator producing income. In *In re Fisher* (3) the payments were instalments of a capital sum, and not income at all. The case is very much like *Neville* v. *Fortescue* (6). See also *In re Sherry* (7).

C. L. Fawell for the testator's children. This is a question of construction of the will. There is here no property forming part of the testator's estate producing their surplus income. The "property actually producing income" referred to in cl. 10 must be property comprised in the testator's estate, and their income is that of funds subject to the settlement and not part of his estate. There is no exclusion of the rule in *Howe* v. *Lord Dartmouth* (1) as regards this income. It can only arise during the widow's lifetime, and it is equivalent to a terminable annuity, the right to receive which should be sold and the proceeds invested, as in *Crawley* v. *Crawley* (8). *Neville*

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(1) 7 Ves. 137a.

(2) [1932] W. N. 188.

(3) [1943] Ch. 377.

(4) (1943) 169 L. T. 365.

(5) [1919] 2 Ch. 93.

(6) (1848) 16 Sim. 333.

(7) [1913] 2 Ch. 508.

(8) (1835) 7 Sim. 427.

v. *Fortescue* (1), is not a general authority that long annuities were always treated as income, and the case is distinguishable. In *In re Whitehead* (2) there were two contrasted cases of capital and income, and on the decision the case is not against my contention. The real question argued in *In re Sherry* (3) was whether or not there should have been a postponement of the sale and *In re Whitehead* (2) was not cited to the court. *In re O'Hagan* (4) is a decision per incuriam, only reported in the *Weekly Notes* without argument, and cannot be treated as an authority governing this case.

Droop for grandchildren. I adopt the last argument. The testator's direction is that income produced by his estate is to be treated as income, and capital of the estate as capital. That leaves the question open whether income of other property falling into the testator's estate after his death is to be treated as capital or income. Though income of the settled fund it becomes capital of the estate.

Hunt adopted this argument.

Cur. adv. vult.

Mar. 28. COHEN J. read the following judgment. The last question on this summons is as to the income of the fund subject to the donation in trust, which I shall hereinafter refer to as "the settled fund," which, on the basis of my answer to question 2, results, by way of resulting trust, to the estate of the testator, and is whether "as between the persons entitled to "(i.) the income and (ii.) the corpus of his estate, the same is and "will be (*a*) applicable as income or (*b*) liable to be invested as "part of such corpus or (*c*) liable to be apportioned between "income and corpus in some and what manner."

I must first state the relevant provisions of the testator's will. [His Lordship then stated the beneficial interests created by the will, and proceeded :] Clause 8 is an investment clause. Clauses 9 and 10 are in the following terms: "(9.) I direct that my Trustees shall be entitled (without pre-"judice to the trust for sale hereinbefore contained) to retain "unconverted for so long a period as they in their absolute "discretion shall think fit and without being responsible for "loss all or any shares securities and other interests to which I "shall be entitled at my death notwithstanding that the "retention of the same may be found to have been hazardous

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(1) 16 Sim. 333.
(2) [1894] 1 Ch. 678.
(3) [1913] 2 Ch. 508.
(4) [1932] W. N. 188.

" or reckless or otherwise improper. (10.) I declare that my " trustees may postpone the sale calling in and conversion of " any part of my real or personal estate for such period as " they may in their absolute discretion deem fit without being " liable to account notwithstanding that it may be of a wasting " speculative or reversionary nature and notwithstanding that " such postponement may be found to have been hazardous or " reckless or otherwise improper and that pending such sale " calling in and conversion the income (including the net rents " and profits of real estate and chattels real after payment of " rates taxes rent costs of insurance repairs and other outgoings " properly attributable in the opinion of my Trustees to income) " of property actually producing income shall be applied as " from my death as income and on the other hand on such sale " calling in and conversion or on the falling in of " any reversionary property no part of the proceeds of such sale " calling in or conversion of such property shall be paid or " applied as past income and I negative the rules known as the " rules in *Howe* v. *Earl of Dartmouth* and *Allhusen* v. *Whittell* " in all their branches."

Mr. Winterbotham, for the testator's widow, admits that if he is to succeed he must satisfy me that the income of the settled fund, which is payable to the testator's executors as a result of my previous decision, is income of property forming part of the testator's estate. When asked: " What property ? " he said that the property is an estate pur autre vie, and that the payments which the testator's executors would from time to time receive out of the income of the settled fund would be income arising from that property. This argument is, at first sight, attractive, but if the matter were free from authority I should have said it was specious, for it seems to me that, although it is true that the payments are income of a fund, they are income of the settled fund and not of any property forming part of the estate, and that, on the contrary, in the aggregate, they constitute an asset of the testator's estate. This last view was supported by Mr. Fawell and Mr. Droop for the persons interested in capital. They relied on a passage from the judgment of Bennett J. in *In re Fisher* (1) approved and applied by Uthwatt J. in *In re Payne* (2). The passage in question reads as follows (3): " It is not possible to point to any " property of which the intestate was possessed when he died

(1) [1943] Ch. 377.
(2) 169 L. T. 365.
(3) [1943] Ch. 382.

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" and to predicate of the annual sums that they are income " arising from that property since the intestate's death. There " was not, and is not, any tree belonging to the intestate of " which the annual payments are the fruits."

The facts of these cases cited were very different from those in the case before me, though it is to be observed that in *In re Fisher* (1) the annual payments in question, which were payable under a contract of insurance on the life of the intestate, were described as " income of 52*l*. per annum." Mr. Fawell said, and I think Mr. Winterbotham agreed, that the payments I am dealing with are analogous to terminable annuities, and on this basis Mr. Fawell submitted that the case was governed by the decision in *Crawley* v. *Crawley* (2). It will be sufficient if I refer to the first two paragraphs of the headnote in that case, which read as follows (2) : " Where an annuity for a " term of years forms part of a residue the executors, until they " can sell it, must invest the payments, and the interest of the " investments will belong to the tenant for life of the residue. " Where sums are set apart to answer contingent legacies, the " interest of them, until the contingency happens, is part of " the *income* of the residue."

Mr. Winterbotham pointed out that this case was shortly reported, no reasons being given for the decision, and that it was difficult to see why the rule in *Howe* v. *Lord Dartmouth* (3), or that branch of that rule which is known as the rule in *In re Earl of Chesterfield's Trusts* (4), did not apply. I agree that that rule does not deal with the question of what is capital or income, but solely with the question of adjusting the rights as between the tenant for life and remaindermen in assets forming part of the testator's estate. The first paragraph was referred to favourably and applied by Uthwatt J. in *In re Payne* (5), though it appears not to have been followed in two cases to which I shall refer hereafter. The second paragraph, which must, I think, like the first, be based on the principle that the annual payments constitute the asset forming part of the testator's estate and not the fruit of an asset forming part of the estate, was followed and applied by Stirling J. in *In re Whitehead* (6). In that case the learned judge distinguished *Allhusen* v. *Whittell* (7), saying : " That judgment was entirely directed

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(1) [1943] Ch. 377.
(2) 7 Sim. 427.
(3) 7 Ves. 137a.
(4) (1881) 24 Ch. D. 643.
(5) 169 L. T. 365.
(6) [1894] 1 Ch. 678, 684.
(7) (1867) L. R. 4 Eq. 295.

"to a case where the legacies were contingent, and the reasoning "was based upon the fact of the contingency; and the Vice-"Chancellor seems to express the opinion that, if the legacies "had been vested, the principle which he treats as established "by authority would not have applied. It seems to me that "the reasoning of the Vice-Chancellor as regards contingent "legacies, and the period at which the tenant for life would "become entitled to the income arising from a fund set apart to "answer contingent legacies, does not apply in the present case, "in which the legacies are vested; and I must treat the case "as if the second testatrix, Mrs. Whitehead, had been entitled "simply to a terminable annuity of a like amount as the income "of the fund set apart for the legacies respectively. If that is "so, then, as has been pointed out by Mr. Lock, the principle of "*Crawley* v. *Crawley* (1) applies; and it seems to me that the "fund must be dealt with in the same way as the fund in that "case—namely, that the income which accrues on the fund "until the legatees attain twenty-five must be treated as capital "and invested—and the tenant for life under Mrs. Whitehead's "will can only receive the income arising from the investment, "while the capital belongs to the remaindermen."

The contrast between the income of the fund set apart to ensure the vested legacies which were not presently payable, and the surplus dividends on the consols is interesting. The consols formed part of the testator's estate; the fund from which the income arose did not.

Had the matter rested there, I should have had no hesitation in holding that any annual payments of income of the settled fund received by the executors were capital and not income; but I must now refer to three cases on which Mr. Winterbotham relied. The first is *Neville* v. *Fortescue* (2). The headnote reads: "Testator, having devised his real estates in strict "settlement, bequeathed his personal estate, in trust, as far as "the nature of it would admit, for the persons who, for the "time being, might have the ownership and be in the possession "of his real estates under the limitations of his will; and then "directed that those persons, *under letters of attorney and powers* "*from the trustees (which he empowered and required them to* "*grant) should receive the yearly dividends which might arise out* "*of the public or other funds, and the yearly interest which might* "*arise from other parts of his personal property,* under the same "restrictions and limitations and to the same extent on which

(1) 7 Sim. 427. (2) 16 Sim. 333.

" they held his real estates :—*Held*, that the testator's personal " estate was to be enjoyed in specie, notwithstanding it consisted, in part, of long annuities and bank stock." That case does not, I think, assist Mr. Winterbotham, since the words in italics in the headnote put it beyond doubt that the testator intended the dividends and the interest in the long annuities to be paid to the tenant for life. *In re Sherry* (1), however, presents more difficulty. In that case the will of the testator contained a similar provision to that in cl. 10 of the will before me. It appears from the headnote : " The " testator's estate included an estate pur autre vie in certain " funds which produced about 244*l.* a year and two policies of " assurance for 1,000*l.* and 750*l.* respectively, the annual " premiums on which amounted to about 60*l.*" The questions which were argued do not touch the point I have to decide, but question 1 did raise it. It was in these terms : " whether under " the provisions of the will and codicils the testator's widow was " entitled during her widowhood to the whole of the instalment " as it accrued due arising in respect of the Harwood property " or whether any and if so what part of such instalment ought " to be treated as capital of the testator's estate " (2). Counsel for the grandchildren, whose interest it was to argue on behalf of capital, appears, by implication, to have let the case for capital go by default, for, dealing with the question of the policies, he said (2) : " As regards the policies, it is submitted " that the premiums ought to be paid out of income. Where " the property is, as here, part of residue the tenant for life " takes the whole of it for better or worse. If the tenant for " life in the present case takes the income of the life interest " it is only fair that she should pay the premiums on the " policies out of it." Accordingly, Warrington J. answered question 1 by declaring that the widow was entitled to the whole income derived from the life interest. That case is undoubtedly a decision in Mr. Winterbotham's favour, though, as the point was not argued, and neither *Crawley* v. *Crawley* (3) nor *In re Whitehead* (4) were cited, I cannot regard it as by any means conclusive.

The next case is the strongest in Mr. Winterbotham's favour. It is *In re O'Hagan* (5). In that case : " By a post-nuptial " settlement made in 1894 by Mr. Henry Osborne O'Hagan,

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(1) [1913] 2 Ch. 508.
(2) Ibid. 510.
(3) 7 Sim. 427.
(4) [1894] 1 Ch. 678.
(5) [1932] W. N. 188.

"funds were settled upon trust out of the income thereof to "make certain payments to his wife until her death or re-"marriage. Then there was a trust out of the surplus income "to pay to each of their three children 200*l.* a year from the "attainment by such child of the age of twenty-one years "until the death or remarriage of the wife. Then there was a "trust to accumulate the surplus income, after satisfying those "previous trusts, until the death or remarriage of the wife, and "to add those accumulations to capital. Subject to the fore-"going trusts, the capital and income were to be held in trust "for their three children. After satisfying those trusts, "surplus income amounting to about 930*l.* a year was accumu-"lated, and at the death of the settlor on May 3, 1930, the "accumulated income amounted to about 15,000*l.* The surplus "income accruing since his death amounted to about 1,600*l.* "a year." Clauson J. held that accumulations after the death of the settlor were invalid under Thellusson's Act, and that there was a resulting trust of them to the testator's estate. The question then arose as to how these accumulations should be dealt with having regard to the terms of the testator's will. The will contained the usual trusts for sale with power to postpone, and the residuary estate was settled upon trusts for his three children and adopted child in equal shares, each beneficiary taking a life interest with remainder to his or her children. By cl. 20 of the will in that case it was declared: that the net rents, profits and income arising from the estate until sale and conversion, in whatever condition or state of investment, and whether consisting of investments of an authorized character or not, including leasehold or other property of a terminable or wearing out nature, should for all the purposes of the will, and as between all persons interested thereunder, be applied as if the same were income arising from the proceeds of such sale and conversion or the investments of such proceeds, no part thereof being liable to be retained as capital. Although Mr. Winterbotham, who was supporting in that case the opposite view to that which he advocated before me, called attention to *Crawley* v. *Crawley* (1) and *In re Whitehead* (2), Clauson J. said (3): "It was well settled that a "terminable annuity ought to be treated as property which, "though terminable, was to be treated as part of the testator's "estate producing income, and it was difficult to differentiate

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(1) 7 Sim. 427.

(2) [1894] 1 Ch. 678.

(3) [1932] W. N. 188.

"the interest in question from a terminable annuity. The "periodical payments of the income, pending a postponement "of sale and conversion, would, by virtue of the provisions in "cl. 20 of the will, be applicable as 'income arising from the "'proceeds of sale . . . . or the investments of such proceeds,' "and be payable to the tenant for life."

I find it difficult to reconcile that case, or *In re Sherry* (1) with *Crawley* v. *Crawley* (2) and *In re Whitehead* (3). In *In re Payne* (4) Uthwatt J. doubted, I think, whether *In re O'Hagan* (5) was rightly decided, but suggested a possible explanation of the two first mentioned cases. He said (6): "It may very well be that it is possible to arrive at the con- "clusion that, upon the true construction of a common form "trust for sale and a common form power to postpone con- "version the phrase 'income of my estate' in those clauses "means 'income which happens to be part of my estate' "and not 'income derived from my estate'; and upon that "footing I have no quarrel with the decision in *In re* "*Sherry* (1) or *In re O'Hagan* (5)." He distinguished there the facts of his case from *In re O'Hagan* (5), and decided that the payments in question in *In re Payne* (4) were capital.

If I were to accept that explanation as the true solution of the difficulty I have mentioned, I should have to follow *In re O'Hagan* (5), for, although there is some difference in language between cl. 20 of the will under consideration in that case and cl. 10 of the will before me, there is, I think, no substantial difference between the two. Indeed, I think it is easier in this case to construe the words in the sense which Uthwatt J. suggested, than it was in *In re O'Hagan* (5). But I have come to the conclusion that *In re O'Hagan* (5) is irreconcilable with *Crawley* v. *Crawley* (2) and *In re Whitehead* (3). The income which resulted to the testator's estate in *In re O'Hagan* (5) was, as in the case before me, analogous to a terminable annuity. Therefore, on the authority of *Crawley* v. *Crawley* (2) instalments thereof should be treated as capital. The fund from which the income arose, like the fund representing the vested legacies in *In re Whitehead* (3), never formed part of the testator's residuary estate; the income arising from that fund was, therefore, not income derived from the testator's estate. It is true that in cl. 10 of the will I am considering the expression is "income . . . . of property actually producing "income," and there is no express reference to the testator's estate, but in its context "property" must, I think, mean "property forming part of my estate." I, therefore, find myself forced to decide whether to follow *Crawley* v. *Crawley* (1) and *In re Whitehead* (2) or *In re O'Hagan* (3). I prefer the reasoning in *In re Whitehead* to the negative reasoning in *In re O'Hagan*, and must, therefore, hold that the income of the settled fund resulting by way of resulting trust to the testator's estate is capital of the estate and not income. The rule in *Howe* v. *Lord Dartmouth* (4), and therefore the rule in *In re Earl of Chesterfield's Trusts* (5), which is a branch of the former rule, are excluded by the express terms of cl. 10 of the testator's will, and if the testator's executors determine to exercise their power to postpone the sale of the right to receive this resulting income, it must be dealt with as and when received in accordance with *Crawley* v. *Crawley* (1). But it is established by authority that where there is in a will power to postpone the sale of assets, followed by a clause excluding the operation of the rule in *Howe* v. *Lord Dartmouth* (4), such clause only operates if the executors, in proper exercise of the power, determine to postpone sale of the asset: (see *Rowlls* v. *Bebb* (6).) See also *In re Fisher* (7), where Bennett J. reached a similar conclusion on the construction or effect of s. 33 of the Administration of Estates Act, 1925.

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(1) [1913] 2 Ch. 508.

(2) 7 Sim. 427.

(3) [1894] 1 Ch. 678.

(4) 169 L. T. 365.

(5) [1932] W. N. 188.

(6) 169 L. T. 366.

I therefore propose to declare that if the testator's executors determine to exercise the power conferred on them by his will to postpone the sale of the right to receive the resulting income, the same should, as and when received, be treated as corpus and invested accordingly, the tenant for life receiving the income of such investments, but that any such income received or to be received before the testator's executors so determine should be apportioned between capital and income in accordance with the principle of *In re Earl of Chesterfield's Trusts* (8). That deals with all the questions.

Solicitors: *Sharpe, Pritchard & Co., for Greaves & Greaves, Bradford.*

(1) 7 Sim. 427.
(2) [1894] 1 Ch. 678.
(3) [1932] W. N. 188.
(4) 7 Ves. 137a.
(5) 24 Ch. D. 643.
(6) [1900] 2 Ch. 107.
(7) [1943] Ch. 377, 385.
(8) 24 Ch. D. 643.

H. L. L.

VAISEY J.

1945

April 19.

In re HARRIS, DECEASED.

COPE *v.* EVANS.

Will—Annuity—Condition subsequent—Forfeiture clause—" Shall . . . . " suffer any . . . . process whereby the annuity shall become payable " to any other person "—Annuitant resident in France—Enemy occupied territory—Payments to Custodian of Enemy Property—Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 7.

An annuity of 52*l.* was given by will, subject to the condition subsequent, that if the annuitant should commit, permit, or suffer any act, default or process whereby the annuity would or might have become vested in some other person, it should absolutely cease and determine as if the annuitant was dead. At all material times the annuitant had been and still was living at Nice, France, and therefore, under the Trading with the Enemy Act, 1939, and the Orders in Council made thereunder, the annuity became payable to the Custodian of Enemy Property, during the war, in consequence of the occupation of France by the enemy :—

Held, that the annuity was not forfeited by payment to the Custodian, an event which was not due to any act, default or process committed, permitted or suffered by the annuitant.

The word " process " in the context must be taken to mean some form of legal process affecting an individual, and could not refer to the passing of an Act of Parliament or the making of an Order in Council, or the giving of any direction under such order.

In re Hall [1944] Ch. 46 applied.

In re Gourju's Will Trusts [1943] Ch. 24 distinguished.

ADJOURNED SUMMONS.

By her will, made in 1934, the testatrix, Elizabeth Anne Harris, after bequeathing her estate to trustees for conversion and investment, directed them to pay to the defendant, Gertrude Frances Evans, an annuity of 52*l.*, free of income tax, during her life, subject to the condition that if the annuitant should commit, permit or suffer any act, default or process, whereby but for that provision the annuity or some part thereof would or might have become vested in or payable to some other person or persons, then such annuity should immediately thereupon absolutely cease and determine as if the annuitant were dead. At all material times, as the testatrix knew, the annuitant was residing at Nice, France. The testatrix died in 1937. Under the Trading with the Enemy Act, 1939, and the Orders in Council made thereunder, the annuitant as a resident of enemy occupied territory became technically an "enemy," and the annuity became payable to the Custodian of Enemy Property. No vesting order was made. The summons was taken out by the trustees asking whether in the events which had happened the annuity was still payable to the Custodian, or whether it had ceased and determined.

H. E. Salt for the plaintiffs.

Wilfrid Hunt for the annuitant. There has been no forfeiture. It cannot be said that the annuitant has committed, permitted or suffered any act, default or process so as to deprive herself of the right to receive it. The words must be read reddendo singula singulis, i.e., "commit" refers to "act" and so on. The case is distinguishable from *In re Gourju's Will Trusts* (1), where the condition was a condition precedent, and incorporated the protective trusts contained in s. 33 of the Trustee Act, 1925, the language of which is quite different from that of the present will, and much wider. The present case is covered by the decision in *In re Hall* (2), the only difference being in the use of the words "suffer" and "process." "Permit" and "suffer" mean the same thing—to undergo, or allow without interference. If there is any ambiguity in a forfeiture clause, the court will adopt the meaning which will avoid any forfeiture: *Hobson* v. *Middleton* (3); *Berton* v. *Alliance Economic Investment Co., Ld.* (4) per Atkin L.J. The words of the clause refer to something done, permitted or suffered by the annuitant individually, but here the annuity cannot at present be paid to her, because she is living in France and she has become subject to an Act of Parliament and an Order in Council, which affects persons generally and not as individuals. As to "process" see the definition in Stroud's Judicial Dictionary. It is limited to a form of legal process.

Danckwerts, for the Custodian of Enemy Property, supported the foregoing argument.

G. G. Solomon for the executor of the residuary legatee. The word "process" means any kind of process, and is not confined to legal process. The use of the words "permit or "suffer" shows that the two words do not mean the same thing. "Permit" means to allow something which could have been prevented. "Suffer" is a purely negative attitude

(1) [1943] Ch. 24.
(2) [1944] Ch. 46.
(3) (1827) 6 B. & C. 295, 303.
(4) [1922] 1 K. B. 742, 759.

and sufficiently wide to cover the operation of an Act of Parliament. See *In re Sartoris' Estate* (1).

Salt referred to the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939.

VAISEY J. stated the facts and continued: This is a case of a defeasance clause in the form of a condition subsequent, and it is very well settled by a long chain of authority, of which *Sifton* v. *Sifton* (2) is a good example, that such a clause must be clear and unambiguous in its terms and must be construed strictly in favour of the persons against whose interests it is alleged to operate. This case, in my judgment, must be carefully distinguished from such cases as *In re Sartoris' Estate* (1) and *In re Gourju's Will Trusts* (3), in both of which the relevant words were not found in a defeasance clause but in the actual limitation of the period during which the payment was to continue. In the last mentioned case a similar question arose under s. 33 of the Trustee Act, 1925, but the words there were very different because they included the happening of any event whereby the destination of the income was altered. Very near indeed to the present case is the recent decision of Uthwatt J. in *In re Hall* (4) where the provision was to the effect that if the annuitant should alienate or charge his or her annuity or become bankrupt, or do or suffer any act or thing whereby the annuity or some part thereof would or might, but for that provision, become vested in or become payable to any other person, the annuity should cease to be payable. Uthwatt J. after pointing out that the fact that the annuitant was living in France resulted in a direction for the actual payment of the annuity to the Custodian, propounded the question as being whether it could be said in that case that the annuitant had done or suffered anything whereby the annuity had become forfeited with the result that it would not be payable to the Custodian. He said (5): "The condition is "a condition subsequent, and the rule is that a condition "subsequent must be construed strictly. Reading the clause "as a whole, it seems to me that it is directed to the forfeiture "of the annuity in the event of the annuitant personally doing "certain classes of things, such as alienating or charging it, "or permitting an act to be done whereby she is deprived of

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(1) [1892] 1 Ch. 11.
(2) [1938] A. C. 656.
(3) [1943] Ch. 24.
(4) [1944] Ch. 46.
(5) Ibid. 48.

" her annuity. It appears not to be directed to a case where " the annuity is subject to an alienation which is not the " result of the countess's own act. In my view, it cannot be " said that she has done an act, as a result of which the annuity " has become payable to the Custodian. She was in France, " the normal place for a French national, when her property " became subject to the provisions of the Act, and I fail to " see how the fact that she was there and remained there can " be said to amount to the doing of an act of the kind which is " contemplated by the clause. The question whether she has " 'suffered' anything is, perhaps, more open. The word " 'suffer' is capable of more meanings than one. I have " come to the conclusion that it is proper to attribute to the " word in this clause the meaning 'permit.' It is clear that " the annuitant has not permitted anything to be done. " Nothing has happened, therefore, to bring this condition " subsequent as to forfeiture into operation and the annuity is " payable to the Custodian."

Turning now to the words of the present will, it will be remembered that here, in order to bring about a forfeiture, the annuitant must have committed, permitted or suffered some act, default or process whereby the annuity is payable to someone else. Here it is not disputed that the annuity has become payable to the Custodian and the problem seems to me to be this, to discover whether there is any act or any default or any process which has been committed or permitted or suffered by the annuitant. I am satisfied that she cannot be said to have committed any act. I am satisfied that she has not committed or permitted any default and I am satisfied that she has not suffered any default. My only doubt was whether it could be said that she had suffered a process. The word " process " may or may not be a word of art and at one time I thought that the successive stages of the passing of the Trading with the Enemy Act and the making of the Enemy (Custodian) Order, and the subsequent direction given under that order, were a sequence of events which could properly be called a " process," and that the annuitant here could be said to have suffered a process in the sense that the process was one which affected her and which she had been obliged to endure. But, in my judgment, that is not the right meaning to attribute to the word " process." In the Judicial Dictionary of the late Mr. Stroud, under the heading " Process," there are quotations from various authorities and other references which

VAISEY J.

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HARRIS, *In re.* COPE *v.* EVANS.

satisfy me that the word " process " ought to be given a technical meaning in a context such as we find here. " ' Process ' " is the doing of something in a proceeding in a civil or " criminal Court ; and that which may be done without the " aid of a Court is not a ' process.' Therefore, a distraint " . . . . is not a ' process,' nor is it ' an execution or other " ' legal process '." In my judgment, the word " process " here means a legal process. Although the words are not the same as those in *In re Hall* (1), they are so very near to them that I should be very reluctant to distinguish this case from that, and it would be merely conducive to uncertainty and doubt if I were to draw so fine a distinction as would be necessary if I were to distinguish this case from the decision in *In re Hall* (1). That case really seems to me to cover this one, and the differences of language are, in my view, without significance.

I will therefore, under clause 1 of the originating summons, declare that on the true construction of the will, and in the events which have happened, the annuity in question has not ceased or determined but is still payable to the Custodian of Enemy Property in accordance with the terms of the will, subject to the provisions of s. 25 of the Finance Act, 1941.

Solicitors : *R. J. Twyford & Sons : The Solicitor, Board of Trade.*

(1) [1944] Ch. 46.

H. L. L.

UTHWATT J.

1945

Feb. 9.

In re WILLIAMS.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* WILLIAMS.

Will—Construction—Annuity " free from income tax at the current rate " for the time being deductible at source "—Reliefs and allowances.

A testator by his will declared that certain annuities should be paid " free from income tax at the current rate for the time being " deductible at source " :—

Held, that all the annuitants were liable to account for a due proportion of their reliefs and allowances on the lines laid down in *In re Pettit* [1922] 2 Ch. 765.

In re Eves [1939] Ch. 969 followed.

ADJOURNED SUMMONS.

By his will, dated November 3, 1937, Sir Howell Jones Williams (hereinafter called "the testator") gave to his wife Muriel Annie Williams an annuity of 2,500*l.*; to Alfred Ernest Whittaker 4*l.* a week during his life; to Francis Leslie Parsons 3*l.* a week during his life; to Arthur Lloyd Roberts 3*l.* a week during his life; to [George] Upchurch 1*l.* 15*s.* 0*d.* a week during his life; and to Bert Reeves 2*l.* a week during his life. The testator directed that these annuities should be paid "free from income tax at the current rate for the time "being deductible at source." The testator died on August 13, 1939, and by this summons the executors asked whether the annuitants were entitled to retain for themselves all the reliefs or allowances from or in respect of income tax to which they might from time to time be entitled in respect of their annuities, or ought to return the same or any part thereof to the executors or the trustees thereof for the time being.

Rawlence for the plaintiffs.

Geoffrey Cross, *Wilfrid Hunt* and *G. D. Johnston* for various defendants.

Cur. adv. vult.

UTHWATT J., in a written judgment, stated the facts and continued: The question raised by this summons is whether the annuitants are entitled to retain for their own benefit all the reliefs and allowances in respect of income tax, or are bound to return any part of the same to the executors and trustees of the testator's will. In *In re Hooper* (1) I stated the general position of annuities given free of income tax and observed that gifts of annuities free of income tax do not fit in at all comfortably with the provisions of the Income Tax Acts. I do not propose to go over the same ground again. Nor do I propose to go through the authorities, a number of which were considered by Evershed J. in *In re Tatham* (2)—dealing with the construction of gifts of annuities given in one form or another free of income tax. The same question of construction arises whether the gift of the annuity is in the general form "Such a sum as after deducting income tax leaves x*l.*" or, as in the present case, in the form of x*l.* free of income tax. According to the authorities that question is in substance whether the reference to income tax is a reference to the

(1) [1944] Ch. 171.

(2) Ante p. 34.

standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will, or whether the provision as to income tax merely indemnifies the annuitant against that part of the annuitant's income tax (other than sur-tax) which is properly referable to the annuity. If construed in the former sense, the actual income tax ultimately suffered by the owner of the annuity does not enter into the picture. Tax at the standard rate is deducted from the gross amount resulting from the calculation and the annuitant receives x*l.* in cash and the income tax referable to the gross amount has been paid for his account.

If construed in the latter sense, complete effect cannot be given to the bequest by payment to the annuitant. The provisions of the Income Tax Acts compel the paying hand, in order that x*l.* tax paid may reach the hand of the annuitant, in the first instance to make an overpayment, for the tax attributable to the gross amount resulting in the payment of x*l.* is still a payment for the account of the annuitant. The practice of the court has been to assume that the annuitant is entitled to treat as his income, for the purpose of calculating his reliefs and allowances, the whole of the income tax paid for his account: and on that footing it has been held that the annuitant is bound to claim reliefs and allowances, in respect of his total income—he is indeed declared a trustee of the right to claim them—and to account to the paying hand for a rateable proportion of the sum received. The net result is that the annuitant receives only his indemnity. He cannot complain. The paying hand receives back as his property a sum which owes its existence to a statement that it forms part of the annuitant's total income. He, too, cannot complain.

The results, where the second construction applies, are curious. An addition to the annuitant's family increasing his allowances, the loss of his other income, the assignment of the annuity to a pauper or to a charity, will work to the advantage of the paying hand. Its assignment to a rich person or to a non-resident not possessing the qualification entitling him to claim reliefs and allowances will work to his disadvantage. A spinster would be liable to account, but I do not know, and I express no opinion on the question, whether, if she marry, her husband is liable to account in respect of reliefs and allowances which he obtains in respect of his total income into which, for income tax purposes, his wife's annuity enters, or whether, indeed, in the case of an annuity given to a married woman, the words "free of tax" add anything. She, it will be recalled, while living with her husband, is not liable to income tax, though tax is deductible on payment of an annuity to her. The general result is that the actual burden on the paying hand can never be predicted and may vary from time to time, and that the second construction works capriciously.

The point was formally taken, in argument, that *In re Pettit* (1) was wrongly decided. The point may be put in this way: It is not right to suppose that, where a gift was made free of tax, the testator could have had in contemplation the subjection of his beneficiary to the burden of tedious calculations and small repayments, and the subjection of his trustees to an obligation to inquire into the annuitant's total income, and that, in construing the phrase, regard should be had to these consequences. The natural assumption is that the testator is referring only to income tax as a rate in the pound deducted on payment. Testators may, indeed, impose on a gift any condition permitted by law, and, no doubt, a condition as to repayment of any sum, however ascertained, may be made on a gift of an annuity. But was any condition intended by the word "free of tax?" There are three possible conditions. The first is that a testator intended to impose on an annuitant an obligation to include, as part of his total income, a sum, the whole of which did not truly enter into it, and account for part of that sum. If, as a matter of law, the annuitant is not entitled to do this, the second alternative is that where, for his own purposes, the annuitant makes out his total income, he is to be driven, in computing his gross annuity, also to compute for himself his expected allowances and reliefs and enter the gross amount of his annuity accordingly—a task beyond the powers of many annuitants. Its performance works only to the advantage of the revenue, for the overpaid tax is irrecoverable. The remaining alternative is that the gross sum referable to the annuity, as paid, enters into the annuitant's total income, but that such total income is subject to a charge for the payment of a rateable amount of the reliefs and allowances claimable, from which on payment, as this would be an annual sum, income tax would presumably be deductible. None of these alternatives could have been intended. With much of this I agree, but it is not open to me to form an opinion on the matter, however much I share the view that the proper test is: "Does the will to be construed show positively an "intention directed to placing on the annuitant or other the "owner for the time being of the annuity an obligation to "account for any part of his reliefs and allowances?" Were that the test, I should in the case of this will answer the question in the negative.

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(1) [1922] 2 Ch. 765.

In this case, applying the test which I conceive to be laid down by the authorities, and following *In re Eves* (1) in particular, I am of opinion that all the annuitants are liable to account for a due proportion of their reliefs and allowances on the lines laid down in *In re Pettit* (2). I cannot distinguish between the various annuities. The provisions relating to an annuity fund and the purchase and commutation of annuities do not, in my opinion, afford any ground for distinguishing this case from the decided authorities.

There is only one further observation which I need make. In *Inland Revenue Commissioners* v. *Cook* (3) the question is raised whether, in the case of an annuity given free of tax, the annuitant is right in including the gross amount necessary, after meeting tax deducted on payment, to produce the stated amount, as entering into her total income. It appears to be conceded, as I understand the matter, that the gift is to be read as indemnifying the annuitant against a due proportion of her actual income tax. The Court of Session has decided that the course adopted by the annuitant is correct. The case is now under appeal to the House of Lords. If the Revenue succeed in their appeal, the position will be established that nothing can be obtained for which an annuitant in this class of case is liable to account. The only result in this event is that there will be no subject-matter on which the declaration which I propose to make will operate. There is, therefore, no reason why, on account of the pendency of the appeal, I should delay dealing with this case.

The order as drawn up was, so far as material, as follows:—

"This court doth declare that upon the true construction of the "will and codicil of the testator Sir Howell Jones Williams so long as "any of the defendants Dame Muriel Annie Williams Alfred Ernest "Whittaker Arthur Lloyd Roberts George Upchurch and Bert Reeves "are entitled or are treated by the Commissioners of Inland Revenue "as being entitled to compute his or her total income for the purposes "of income tax upon the footing that there enters into it a gross

(1) [1939] Ch. 969.
(2) [1922] 2 Ch. 765.
(3) (1944) A. T. C. 218.

" amount which is ascertained by adding back the whole income tax " deducted on paying the annuity bequeathed to him or her by the " said will each of the said defendants so entitled or treated as being " entitled as aforesaid is a trustee of the same proportion of his or her " statutory rights to relief from income tax as the proportion which " the grossed amount of his or her annuity for each year for the purpose " of income tax bear to his or her total gross income of that year for " the purpose of income tax (or in respect of any year in which the said " grossed amount of his or her annuity constitutes his or her total " income for the purposes of income tax then the whole of such rights " to relief) and was and is bound at the request of the trustees or " trustee for the time being of the said will to sign all proper forms " and documents for that purpose and to pay over to the said trustees " or trustee the whole of such part as aforesaid of the sums recoverable " in respect of such reliefs or enable such trustees or trustee to obtain " payment thereof."

UTHWATT J.

1945

WILLIAMS, *In re.*

MIDLAND BANK EXECUTOR AND TRUSTEE CO., LD. *v.* WILLIAMS.

Solicitors: *T. D. Jones & Co.; Barton & Hanning.*

J. L. D.

In re TREE.

IDLE *v.* TREE.

EVERSHED J.

1945

Apr. 24, 25.

Charity—Charitable bequest—Trust to assist persons residing in the borough of H. in or before the year 1880, *or their descendants, to emigrate—Validity.*

A testator directed his trustees to hold one half of his residuary estate on trust for the purpose of " assisting persons who resided " in the Borough of H. in or prior to the year 1880 or the descen- " dants of such persons to emigrate to any of the Dominions of " the British Empire," and directed that " in no case shall more " than the sum of 50*l.* be given to or in respect of any one person " or more than the sum of 150*l.* to or in respect of any one " family . . . . " :—

Held, that the testator had defined the class to be benefited, not by reference to descent from some specific individual or individuals selected by him as such, but by reference to a section of the public; and that the gift was a valid charitable gift.

In re Compton, ante p. 123, distinguished.

ADJOURNED SUMMONS.

A testator, who died on January 21, 1927, by his will dated March 1, 1926, directed his trustees to hold one half of his residuary estate on trust to " devote the income thereof " from time to time as they may deem expedient for the "purpose of assisting persons who resided in the Borough of "Hastings in or prior to the year 1880 or the descendants "of such persons to emigrate to any of the Dominions of "the British Empire my object being to improve the con-"dition of life of such persons and the upholding of the "Empire but it is my wish and I hereby direct that in no "case shall more than the sum of fifty pounds be given to or "in respect of any one person or more than the sum of "one hundred and fifty pounds to or in respect of any one "family and that assistance shall only be granted after due "enquiry as to the suitability of the person or family concerned "for emigration and under the advice of the Lord Com-"missioner or other responsible official of the respective "Dominion."

A summons was taken out by the trustees of the will to determine whether the above direction created a valid charitable trust.

Pennycuick for the trustees.

Wilfrid Hunt for the Borough of Hastings.

Danckwerts for the Attorney-General. This is a valid charitable gift. In the first place, as the amounts, to the extent of which the recipients are to be benefited, are 50*l.* in the case of an individual and 150*l.* in the case of a family, the testator evidently contemplated the relief of poor people. A trust for the relief of poverty does not mean a trust for the relief of a few poor persons, but of poverty generally. It is not easy to find a definition of what makes a direction of this kind a public trust, but a trust for the persons inhabiting Hastings at a particular date is a trust for a community sufficiently large to make that trust a public trust. It is difficult, however, to say where the line is drawn. [He referred to Tyssen's Charitable Bequests, 2nd ed., p. 57; and to *Barclay* v. *Maskelyne* (*No.* 2) (1); *In re Sidney* (2); *Verge* v. *Somerville* (3); *Keren Kayemeth Le Jisroel, Ld.* v. *Commissioners of Inland Revenue* (4).]

Geoffrey Cross for the next of kin. This bequest is not a valid charitable trust. It is impossible to spell out of the clause only an intention to benefit the poor. The class to be benefited is a fluctuating class of private individuals and lacks the public element, which is the pre-requisite of its being a charity.

(1) (1858) 4 Jur. (N. S.) 1294.
(2) [1908] 1 Ch. 488.
(3) [1924] A. C. 496.
(4) [1931] 2 K. B. 465.

[He referred to *In re Compton* (1) and *In re Drummond* (2).] In *In re Compton* (1) the problems are set out, but that case does not suggest a solution or make the matter very clear. The class in the present case is a purely fortuitous aggregation of persons tracing a common ancestry, and the common connexion is so shadowy that it is difficult to see how the gift can be held to be charitable.

Danckwerts in reply. On the question of poverty, the view of Eve J. in *In re Drummond* (2) is not inconsistent with the subsequent authorities. He referred to *In re Carteret* (3).

EVERSHED J. The question which has to be determined in this case is whether a valid charitable trust is constituted by a disposition of half of the testator's residuary estate by his will, made in the year before his death in 1927. On the wording of the disposition two questions have been argued. The first is whether, on the true construction of the language, the persons intended to be capable of benefiting ought to be limited to poor members of the class indicated: and the second, whether the gift complies with the necessary condition that it is of a public character; that is to say, is the class, from which the persons who may benefit will be drawn, a section of the public or of the community; or is it what has been called in the language used in *Goodman* v. *The Mayor of Saltash* (4) and *Verge* v. *Somerville* (5) a trust for private individuals, albeit a fluctuating body of private individuals?

A number of cases has been cited, the last of which was *In re Compton* (1), recently before the Court of Appeal, and the real problem, as it seems to me, is the application to the present will of the language used by the Master of the Rolls in that case.

The conclusion to which I have come is that in this case the necessary conditions have been satisfied and that there is here a valid charitable trust. Before proceeding further, I interpose to say this: *In re Sidney* (6) has been cited to show that a trust for the purpose of promoting emigration simpliciter would not be a valid charitable trust, on the ground that it would not be apparent from a trust so constituted that any benefit was intended to be conferred on any section of the community. Buckley L.J. gave reasons in his judgment for

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(1) Ante p. 123.
(2) [1914] 2 Ch. 90.
(3) [1933] Ch. 103.
(4) (1882) 7 App. Cas. 633.
(5) [1924] A. C. 496.
(6) [1908] 1 Ch. 488.

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that conclusion, which I need not repeat. On the other hand, *Barclay* v. *Maskelyne* (*No.* 2) (1) shows that, where the trust is further elaborated, it may be perfectly clear that it is one which is intended to benefit, and would benefit, a section of the community, so as thereby to comply with the necessary conditions to make it charitable.

I now turn to the terms of the will. On the first contention, namely, whether on the true construction of the words used the intention was to limit the class of persons which could benefit to poor persons (poor, that is, without being destitute), my own inclination is to think that it is so limited. I reach that conclusion by observing that the purpose asserted in that of "assisting persons who resided in the Borough of Hastings ". . . . to emigrate to any of the Dominions"—it is to be noted that the assistance is limited to the act of emigration— "my object being to improve the condition in life of such "persons." Further, it is to be observed that the amount of the pecuniary benefit in each individual case permitted for the purpose of assisting that individual to emigrate is 50*l.* The testator, therefore, is contemplating that an individual will reasonably require the assistance provided by a sum not exceeding 50*l.* to enable him to improve his condition in life as a result of emigrating. These matters, taken together, indicate, to my way of thinking, that the testator had in mind a person whom the provision of an amount of that kind would enable to improve his condition; which seems to show that he would be poor rather than rich, though not necessarily destitute.

I have not so far referred to the class concerned. I must now turn to that, because I think it is conceded that, whether or not I am right in suggesting that the persons intended to be benefited are what might be properly described as the poorer persons of the specified class, it still is necessary to show (and this, I think, inevitably follows from the decision in *In re Compton* (2)) that this trust, if it is to be valid, must possess the necessary public quality. The class selected is obviously somewhat peculiar, and no clue is given in the will to show what the testator had in mind in so describing the class. As I have stated, the class consists of persons who resided in the borough in or before the year 1880, or the descendants of such persons. It is plain that, from the administrative point of view, a class so described may give rise to

(1) 4 Jur. (N. S.) 1294. (2) Ante p. 123.

great difficulties. Whether the Conqueror ever lived on that part of the coast after the battle, I do not know; but, if he did, presumably anybody who was descended from him would be able to bring himself within the class. However, I think it is conceded that, for present purposes, the difficulty of ascertaining whether the necessary condition is satisfied by someone who claims to be entitled to benefit is neither here nor there. The question is whether a class so described is a portion of the public within the principle as stated by Lord Greene in *In re Compton* (1). I shall certainly follow the learned Master of the Rolls in avoiding any attempt to define exhaustively when a trust is public and when it is private, but the argument was most forcibly put to me by Mr. Cross, on the part of the next of kin, that this trust is bad. He said that a member of the class to be benefited must be qualified as such by reference to a characteristic which must be said to be so personal to himself that the whole trust is essentially private rather than public. According to Mr. Cross, anyone entitled to qualify must say: "I qualify because I am I; "that is, because I am the son of my father or the grandson "of my grandfather." He contends that that is a characteristic essentially personal to the claimant, and not one which could be said to delimit some section of the community from the community as a whole, by reference to something common to all the persons entitled to qualify. Briefly stated, *In re Compton* (1) was a case where the testator created, for the purpose of establishing an educational trust, a class consisting of the descendants of three persons whom he named and described. It is to be observed that throughout the judgment the distinction, which was drawn in broad and general terms, is a distinction between what Lord Greene called a private or family trust, on the one hand, and a public trust on the other. The number of persons who may qualify, in the one case or the other, though possibly relevant, is certainly not conclusive.

If the matter rested on just such a brief statement as I have made, my own view certainly is that when one speaks of a private or family trust, one has in one's mind a conception which applied in the case of *In re Compton* (1), but would not apply in a case such as this. I think the idea which underlies the notion of a private or family trust, though it may be difficult to define, is reasonably clear to the mind.

(1) Ante p. 123.

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However that may be, it is necessary to observe a little more closely the language that Lord Greene uses, and to see whether the principles, as he formulated them, apply in this case either to establish or to defeat the validity of the trust. As I understand the matter, it must follow, I think, if Mr. Cross's argument is right, that a gift to a class which consists of a section of the community defined by reference to location would prima facie be good for this purpose ; yet, that if the class is increased by adding to the persons so defined (that is, by reference to locality) the children or descendants of those persons, then it must inevitably fail ; because it is fundamental to his argument that proof of ancestry as a qualification is a proof of something personal to the applicant and not of something impersonal, such as is necessary if the trust is to be " public." I confess that such a conclusion would seem to me to be strange and somewhat irrational, but that, of course, is not to say that it is wrong.

In *In re Compton* (1), the conclusion of the Master of the Rolls was expressed in these terms : " I come to the conclusion, " therefore, that on principle a gift under which the beneficiaries " are defined by reference to a purely personal relationship to " a named propositus cannot on principle be a valid charitable " gift. And this, I think, must be the case whether the " relationship be near or distant, whether it is limited to one " generation, or is extended to two or three or in perpetuity. " The inherent vice of the personal element is present however " long the chain and the claimant cannot avoid basing his " claim on it." So far as that passage is concerned, it seems to me that no great difficulty is created, because it is fundamental to the conclusion so stated that there should be a named propositus ; that is to say, it is fundamental that the propositus is someone selected, not by reason of his possessing characteristics which he might have in common with thousands of others, or, indeed, with any other individual, but is selected without regard to any characteristics, save that he was an individual chosen as such by the testator, either because he was a friend or relative or for some other reason. Though the conclusion, as I have tried to state it, does not seem to me to give rise to difficulty in the case which I have to decide, other language of the Master of the Rolls does create a real difficulty. Earlier in his judgment (2) he uses this language. After referring to the poor inhabitants of a parish as a class, he says : " But

(1) Ante p. 131.

(2) Ibid. 129.

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"they do not enjoy the benefit, when they receive it, by virtue "of their character as individuals but by virtue of their "membership of the specified class. In such a case the "common quality which unites the potential beneficiaries "into a class is essentially an impersonal one. It is definable "by reference to what each has in common with the others, "and that is something into which their status as individuals "does not enter." A little later, after referring to the propositi A.B., C.D. and E.F.: he says: "In such a case, too, a purely "personal element enters into and is an essential part of the "qualification, which is defined by reference to something, "i.e., a personal relationship to individuals or an individual "which is in its essence non-public." It is, briefly, on those passages that Mr. Cross has mainly founded his argument.

As I have already indicated, I think the essential quality here is the connexion, albeit at one, or more than one, remove, with a particular locality, Hastings. True it is, as Mr. Cross urges, that proof of ancestry in a sense is something personal. But, in my view, proof of descent from a resident in Hastings, that is not from a named resident but from any resident, is, within the principle of *In re Compton* (1), proof of a quality which is impersonal in the sense that, so far as this testator is concerned, the residents, or the descendants of residents, as individuals, are at no link in the chain selected by him as such, nor is he in the least concerned who they, as individuals, may be. It is open to any person who can claim to have the characteristic of a Hastings ancestry, if I may so describe it, to come in and say: "I am a member of the class entitled "to benefit." And that class, however awkwardly ascertained or defined, is a section or portion of the general public.

To take an example from the cited cases, if the class consisted of men who had fought during the first great European war in some theatre of operations, there would clearly be a common characteristic, though a characteristic at the material time not to be determined by reference to connexion with a locality. Further, any man who comes forward and claims to belong to the class must, in a sense, prove something which is strictly personal and individual to himself. For he must say: "I fought in that theatre of operations in such and such "a year." So, if the class were residents of Hastings, a claimant will assert: "I am a resident of Hastings." That fact is in truth personal to himself. And if there is more than one qualification required, obviously the individuality becomes

(1) Ante p. 123.

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more pronounced. For example, if the gift were to such of the residents of Hastings as were in receipt of an income not exceeding x*l.* per annum (which I apprehend would be, prima facie, a valid public charity), the claimant would have to show, in addition to the fact of residence, the fact that his income did not exceed the limit of x*l.*, a matter certainly personal to himself. Though, therefore, it is true that if there is more than one qualification to be satisfied the individual characteristics of the claimant become more pronounced, nevertheless the essential element remains impersonal, namely, the connexion with some locality, or some other qualification which does not involve the notion that the testator is picking out or selecting individuals as individuals but is merely defining a way in which out of the total of the community some section or portion thereof may be delimited, that portion being those members of the community as a whole who can each claim to satisfy a number of conditions, impersonal in the sense that their own individualities are, from the testator's point of view, an immaterial consideration. If a gift to all the inhabitants of Hastings, not having more than so much income per annum, or to the inhabitants of Hastings other than the members of the Roman Catholic community, are good charitable gifts, it seems to me that on principle there should be no difference in the case of a class defined by reference to persons resident in a particular locality plus descendants of persons so resident. It seems to me, therefore, that the present case is distinguishable from *In re Compton* (1), and that the language which I have cited in Lord Greene's judgment, referring to status as individuals, is intending to refer to something other than the characteristics which, though necessarily peculiar to the individuals making the claim, nevertheless, do not mark out the individuals as individuals selected as such by the testator.

In his argument in reply, Mr. Danckwerts referred to two cases in Tyssen's Charitable Bequests as lending some assistance on this point. I have had an opportunity of referring to them. One of them was *Attorney-General* v. *Ward* (2). Unfortunately, reference to that case does not seem to me to carry the matter any further. The actual terms of the gift in that case were as follows: "and also to pay 500*l.* to the sons of the clergy in "London according to the Will of my late uncle James Horton "of Guilsborough." According to the report, no argument was addressed to the question whether that was or was not a good charitable bequest. It was throughout assumed that it was,

(1) Ante p. 123.

(2) (1797) 3 Ves. 327.

the question decided in that case being wholly different and in no way related to the question of the validity of the charitable bequest. The second case, *Powell* v. *The Attorney-General* (1), is a little more helpful. There was in that case a bequest of residue to the widows and children of seamen belonging to the town of Liverpool. Two questions were argued, as I understand the somewhat short report, namely, first, whether that was a good charitable gift, and, secondly (with the emphasis mainly on the second point), whether in truth that was a description of an already existing charity. The decision of the court is reported as follows: "The Master of the Rolls" [Sir William Grant] "held that it was a valid bequest, and that the words "were sufficiently descriptive of the last of the charities mentioned in the Master's report." That is, therefore, some authority for the view that a gift to widows and children of seamen belonging to the Port of Liverpool is a good charitable gift, and as such it does, I think, lend some, though slender, support to the conclusion which I have already stated. The point, that they were intended to be benefited as poor widows and children, only arose because the existing charity, which was held to be the one intended, was in fact a charity which had been established and instituted some time before for giving relief to poor sailors' widows and orphans, the inhabitants of Liverpool.

I have reached the conclusion, as I have stated, that as a matter of principle the condition that there should be a public characteristic is satisfied in this case, and that the testator, in defining this class, has defined it not so as to consist of, or be derived from, some specified individual or individuals—and I may add that the result would be the same whether the individual was a body corporate or not—selected by him as such, but by reference to a section or portion of the community as a whole, distinguished from the rest of the community—but still remaining a part of it—by reference to a characteristic which does not involve the notion of selection by the testator, at any stage in the devolution, of individuals as individuals.

On these grounds, I think the right answer to the question raised here is that this is a good charitable bequest.

Solicitors: *Blyth, Dutton & Co., for Menneer, Idle, Brackett & Williams, St. Leonards; Sharpe, Pritchard & Co., for D. Jackson, Town Clerk, Hastings; Skelton & Rust; The Treasury Solicitor.*

J. L. D.

(1) (1817) 3 Mer. 48.

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April 19, 20; May 16.

In re FERODO, LIMITED.

Trade mark—Application for registration—Defensive registration—Invented word—"Connexion in the course of trade"—"Other goods"—Onus—Character of evidence in support of such an application—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 27, *sub-s.* 1*—Trade Marks Rules,* 1938 (*St. R. & O.,* 1938, *No.* 661), *sch. IV., classes* 5, 34

A company, which manufactured brake and clutch blocks and linings, applied, under s. 27, sub-s. 1, of the Trade Marks Act, 1938, for the registration of their trade name " Ferodo " as a defensive mark in respect of all the goods comprised in classes 5 and 34 in sch. IV. to the Trade Mark Rules, 1938 :—

Held, that the application must be dismissed, as the applicants had failed to discharge the onus placed on them of showing that the word " Ferodo " had become so well known in its application to goods of a specific kind (namely, brake and clutch blocks and linings originating in fact from the applicants), that its use in relation to other goods in classes 5 and 34 would be likely to lead persons buying or observing those other goods to suppose that they too originated from the persons who made or marketed " Ferodo " brake and clutch blocks and linings, namely, the applicants.

Held, further, that the phrase " connexion in the course of trade " contained in the sub-section does not cover goods in classes 5 and 34 used as advertising media by the applicants.

Observations as to the evidence to be given in applications of this nature.

Aristoc, Ld. v. *Rysta, Ld.* [1945] A. C. 68, referred to.

APPEAL from a decision of the Assistant Comptroller.

An application was made by Ferodo, Ld., under s. 27, sub-s. 1 (1), of the Trade Marks Act, 1938, for the registration

(1) Trade Marks Act, 1938, s. 27, sub-s. 1 :—" Where a trade " mark consisting of an invented " word or invented words has " become so well known as respects " any goods in respect of which it " is registered and in relation to " which it has been used that the " use thereof in relation to other " goods would be likely to be taken " as indicating a connexion in the " course of trade between those " goods and a person entitled to " use the trade mark in relation to " the first-mentioned goods, then, " notwithstanding that the pro- " prietor registered in respect of " the first-mentioned goods does " not use or propose to use the " trade mark in relation to those " other goods and notwithstanding " anything in the last foregoing " section, the trade mark may, on " the application in the prescribed " manner of the proprietor " registered in respect of the first- " mentioned goods, be registered " in his name in respect of those " other goods as a defensive trade " mark and, while so registered, " shall not be liable to be taken " off the register in respect of " those goods under the last fore- " going section."

in their name of their trade mark, consisting of the invented word "Ferodo," as a defensive trade mark in respect of all the goods comprised in class 5 (Pharmaceutical substances) and class 34 (Tobacco . . . . smokers' articles and matches) in sch. IV. to the Trade Marks Rules, 1938. The Assistant Comptroller held, on the evidence, that the applicants had failed to satisfy the onus laid on them by the sub-section, but that they would be entitled to registration in respect of such goods (if any) falling within the two classes 5 and 34 as could properly be said to be of the same description as "goods in "respect of which it [the mark] is registered and in relation to "which it has been used." The applicants had for forty years carried on a business consisting mainly in the manufacture of brake and clutch blocks and linings for use in machinery, including motor cars. The applicants appealed.

Lloyd-Jacob for the applicants.
Danckwerts for the Board of Trade.

Cur. adv. vult.

May 16. EVERSHED J., reading a judgment, said: This is an appeal from a decision of the Assistant Comptroller, dated May 15, 1944, refusing an application under s. 27, sub-s. 1, of the Trade Marks Acts, 1938, by Ferodo, Ld., for registration in their name of their trade mark, consisting of the invented word "Ferodo," as a defensive trade mark, in respect of all the goods comprised in class 5 (Pharmaceutical substances) and class 34 (Tobacco . . . . smokers' articles and matches). The Assistant Comptroller held, on the evidence before him, that the applicants had failed to satisfy the onus laid on them by the sub-section. He was of opinion, however, that, on the evidence submitted, they would be entitled to registration under the sub-section in respect of such goods (if any) falling within the two classes 5 and 34 as could properly be said to be of the same description as goods in respect of which the applicants' mark was already registered and used, and he gave leave to them to file further evidence for this purpose, or to add to their evidence, with a view to establishing their wider claim to registration in respect of all the goods comprised in both classes. The applicants have not so far availed themselves of these opportunities. As this appears to be the first case which has arisen under s. 27, sub-s. 1, since its addition to the trade marks legislation in 1938, the applicants have prosecuted this appeal with a view to obtaining the opinion of the court on the construction of the sub-section, and particularly on the nature, of the onus imposed on an applicant thereunder and the character of the evidence required in support of such an application. It is conceded by Mr. Danckwerts, on the part of the Comptroller-General, that my decision on the appeal, if adverse to the applicants, will not prejudice their right, under the liberty already afforded to them, to bring the matter again before the Comptroller-General on such further evidence as they may be advised or be able to tender.

Before reading the sub-section it will be convenient for me to refer briefly to the evidence filed by the applicants in support of their application. The main point to be observed in regard to this evidence, which was analysed by the Assistant Comptroller in the course of his careful decision, is that it is confined to the evidence of the applicants themselves, proving the nature and extent of their business, the various kinds of goods manufactured by them in relation to which the mark has been registered and used, and the character and volume of advertisement of their goods and mark undertaken by them over a period of years. Thus it is proved that the business of the company, which has been carried on continuously and on an increasing scale for nearly forty years, consists in the main of the manufacture and sale of brake and clutch blocks and linings and similar articles for use in machines of various kinds, including motor cars, but it also extends to cover a few more domestic articles, namely, stair and step treads and covers. During the period of ten years from 1932 to 1941 the annual value of the applicants' sales rose from somewhat over half a million to more than a million pounds sterling. During the same period the average annual expenditure by the company on advertising was over 26,000*l.*, the advertising matter including insertions in the daily press and periodical magazines as well as technical papers, and comprehending also display signs on roadsides, bridges, garages and the like. The number of the applicants' customers, both trade buyers and members of the public, is approximately 60,000. On this evidence, and on this evidence alone, it is contended by Mr. Lloyd-Jacob, on behalf of the applicants, that the court ought to find as a fact such a degree of notoriety established by them for the use of their invented word " Ferodo " as a trade mark that the use of the word in relation to any of the goods comprised in classes 5 and 34 (and, indeed, in relation to any other goods than those in respect of which the mark is now registered and used) would be likely to be recognized and identified by persons seeing the word so used as the applicants' mark, and that accordingly the necessary requirements of a successful application under the sub-section have been satisfied.

As I have already stated, the word "Ferodo" is beyond doubt an "invented" word, having been invented by the applicants' predecessors, owners of the business, about the year 1906. Being an invented word, the goodwill attached to its use has been wholly built up by the work and energies of the applicants and their predecessors. It is accordingly urged on the part of the applicants that there is at least a strong moral case for justifying the grant of monopolistic rights in regard to that which is the exclusive creation of the applicants or, conversely, that the court should not be slow to prevent other persons obtaining for themselves the advantages attaching to a well-established trade word in respect of goods however different in kind from those marketed by the inventor of the word. And no doubt on grounds such as these the new section has been enacted and its scope confined to the case of invented words.

But however cogent may be the moral argument, my duty is to construe the words used in the sub-section. The applicants invite me to hold that if the invented word is sufficiently well known it does not matter that the persons who know the word should not also know the goods or the kind of goods with which it has been associated by the inventor, or should not know who are the persons entitled to use the word as a trade mark, or, at least, to hold that the reference to a likelihood of an indication of a connexion in the course of trade between the goods in respect of which a defensive registration is sought and a person entitled to use the trade mark means no more than that the court should infer a likelihood that persons seeing the word used in relation to such goods will identify the word as a trade mark already well known to them. In my judgment these contentions fail to do justice to the limitations imposed by the phrase "as respects any goods etc." which immediately follow the words "so well known," or to give proper weight to the later requirement that the assumed use of the word would be likely to be taken as indicating a trade connexion with a person entitled to use the trade mark. In my judgment the earlier phrase which I have mentioned requires that the knowledge of the word should be knowledge of it in its application to goods of a specific kind; and the conclusion to be reached by the court or the Comptroller-General must be the inference, in the light of all the known facts, including the general knowledge of the word in its application to the specific goods mentioned, that persons seeing the mark attached to the new class of goods would assume that they originated from the proprietor of the mark or a registered user. Thus, in the present case, it is in my opinion necessary to show that the word "Ferodo" has become so well known in its application to goods of a specific kind, that is, brake and clutch linings and the like (originating in fact from the applicants), that its use in relation to "other goods" in classes 5 and 34—for example, when applied to a bottle of aspirin tablets or a packet of cigarettes—would be likely to lead persons buying or observing those "other goods"—for example, the aspirin tablets or the cigarettes—to suppose that they too originated from the same persons who made and marketed Ferodo brake and clutch blocks and linings, namely, the applicants.

In reaching a conclusion on this matter it is obvious that the nature of the goods "in respect of which" the trade mark "is registered . . . . and used" is an important factor, for generally speaking the more special in character those goods are, and the more limited their market, the less likely will be the inference required by the sub-section to be drawn in relation to goods of a very different kind. If "Ferodo" were a mark which had achieved notoriety in connexion with, say, a paint or a dye-stuff used by the domestic householder, the required inference would, it seems to me, be much more easily drawn from its application to pharmaceutical products. In this connexion reference was made in the course of the arguments to an observation of a former Registrar of Trade Marks, to the effect that some trade marks (Bovril and Kodak being given as examples) are so well known in one particular field that their use by any person other than the proprietor in respect of any goods whatsoever would prima facie suggest an association of such goods with the proprietors of the marks. For myself I am not persuaded of the soundness of this proposition. Words do not become known as words without any significance or without appreciation of the things which they indicate, and so far as trade marks are concerned it may well be that the better known the words become the more closely are they associated in the public mind with the class of articles to which they are in the course of trade applied. I do not intend to pass judgment on any case not now before the court, but if, for example, Bovril is well known to the great majority of the population of this island, and if it is so known as indicating a particular kind of foodstuff, then, on that very ground, the application of the word to, say, a typewriting machine, might well be held not to be in the least degree likely to lead to the indication referred to in the sub-section. To take as another illustration a word which does not happen to be an invented word (for the principle for present purposes seems to me to be the same), the events of the past five and a-half years have, for the whole British people save to very small infants and a few idiots, made the word " Spitfire " familiar in their mouths as a household word, but familiar as a description of an aeroplane. If a manufacturer of toothpaste were to describe one of his products as " Spitfire toothpaste " I should find it difficult to suppose that to any purchaser of the toothpaste the name would indicate a connexion in the course of trade between the toothpaste and the aircraft manufacturers. On the other hand, if the mark has been registered and used in respect of a wide variety of goods required by the common man, its application to other goods, even of a very different kind, might fairly lead to the inference of trade connexion, and the example of Kodak may well illustrate the latter kind of case. Each case will indeed be decided on its own facts. It will suffice for me to say in regard to the word " Ferodo " that I agree with the Assistant Comptroller that the somewhat narrow and special field of manufacture to which the mark has been applied and become known increases the difficulty of establishing, as a matter of fact, that the adoption of the word " in relation to " goods of a widely different character would be likely, according to the standard of common sense, to lead to an inference of common origin.

In the last sentence I have intimated my answer to another point stressed by Mr. Lloyd-Jacob in his argument for the applicants. The reference in the sub-section to an indication of " a connexion in the course of trade " is a reflection of the definition of a trade mark in s. 68, sub-s. 1, of the Act. This language, according to the argument, imports a conception distinct from the conception implicit in the well-known phrase " likely to deceive or cause confusion " which is used in ss. 11 and 12. It is therefore urged that the obligation imposed on an applicant under s. 27, sub-s. 1, is satisfied by something less than proof of likelihood of deception or confusion between the goods in respect of which defensive registration is sought and the goods in respect of which the mark has been registered and used. The argument adds that the reference to "a person "entitled to use the trade mark in relation to the first-mentioned "goods" instead of to the proprietor of the trade mark supports the view that knowledge of the origin of the goods to which the mark has been applied is unnecessary—in other words that it is sufficient that persons assumed to see the word in its application to the new class of goods should identify it with a trade mark already observed and known to them, even though they are ignorant of the nature and origin of the goods to which it had been applied. The argument in my judgment involves too great a nicety of language. Since ex hypothesi the applicants' trade mark has not been and may never be used in respect of the goods for which registration under the sub-section is sought, it may well have been thought that the test of confusion would be inappropriate. But if an inference were drawn, and falsely drawn, of a connexion in the course of trade, the result would nevertheless have been a form of deception. I do not therefore think that any great significance can be attached to the distinction in this respect between the wording of s. 27 on the one hand and that of ss. 11 and 12 on the other. Moreover, the decision of the House of Lords in *Aristoc, Ld.* v. *Rysta, Ld.* (1), has made it clear that the language of the present definition section referring to "a connexion in the course of trade, etc.," which has been incorporated also in s. 27, sub-s. 1, involves no departure from the old-established conception of indication of origin. The use of the phrase "person entitled to use the trade "mark" instead of "proprietor" is no doubt attributable to the introduction, contemporaneously with s. 27 of s. 28, which provided for the registration of users as well as proprietors. But though I do not say that the notoriety required by s. 27, sub-s. 1, must involve exact knowledge of the identity of the registered proprietor or registered user, I think it does require knowledge of the kind of goods to which the mark has been applied by their manufacturers and distributors as an indication of origin. It is not uncommon to-day for manufacturers of or traders in goods of a specific class to advertise their wares by the distribution as gifts of goods, e.g., pencils or matches, bearing their name or trade mark, though such last-mentioned goods are wholly different in character from their own goods; and it is in evidence in the present case that the

(1) [1945] A. C. 68.

applicants have in fact adopted this practice in regard, inter alia, to matches. A member of the public seeing goods of the character of those comprised in classes 5 or 34 bearing the name " Ferodo " might suppose that such goods were being distributed as part of an advertising campaign. He would not, however, suppose that, being so distributed, the manufacture or distribution of the goods formed any part, save for advertising purposes, of the business of Ferodo, Ld. In my judgment it follows from the *Aristoc* case (1) that the phrase " connexion " in the course of trade, etc." does not cover advertising media of this kind. In other words I think that by a connexion in the course of trade is meant (as regards the present case) that the production and marketing of the goods in question is a part of the applicants' business or trading enterprise.

In my judgment the conclusion I have reached on the construction of the sub-section does not so confine its scope as to render unsubstantial any advantage given by the sub-section to the proprietor of the trade mark additional to the advantages conferred by older sections of the Act. I am content, without further analysis, to note the real and obvious benefit attached to the position of being first in the field. I will add finally, before leaving this part of the case, that I agree with the Assistant Comptroller that the " other goods " mentioned in s. 27, sub-s. 1, cannot be confined to goods of the same description (as that phrase is used in s. 12, sub-s. 1, of the Act) as the goods in respect of which the mark has been registered and used. No doubt, and for obvious reasons, an applicant under s. 27, sub-s. 1, would be able more easily to establish a claim to defensive registration in respect of a class of goods which were of the same description as goods in relation to which his mark had been registered and used, but it is, to my mind, reasonably plain (and Mr. Danckwerts has not argued to the contrary) that there is no reason for construing the phrase " other goods " in a limited sense or otherwise than in accordance with its ordinary meaning.

There remains the question of the character of the evidence to be tendered in support of an application under s. 27, sub-s. 1, of the Act. This matter I approach with considerable caution, since it cannot be the function of the court to advise applicants under the sub-section generally, or the present applicants in particular, on the evidence properly to be given in

(1) [1945] A. C. 68.

support of an application, nor would it be right for me, in reference to the particular circumstances of the present case, to lay down rules applicable to other cases the determination of which would depend on their own particular facts. Subject, however, to these qualifications, and in deference to the arguments addressed to me, I make the following two observations: First, in addition to the evidence of the applicants themselves in the present case it seems to me desirable that there should be available for the assistance of the court at least some evidence from persons concerned and experienced in the trades affecting the classes of goods in respect of which defensive registration is sought. It should, as it seems to me, be proved that the word "Ferodo" has not in fact already been used and applied to any goods falling within those classes. Secondly, it might well, I think, be important for the court to be informed of the significance within those trades of the use of brand names. Thus, as regards, for example, aspirin tablets, purchasers of such goods may, by reason of the multiplicity of brand names applied to goods which are in quality substantially identical, or for other reasons, pay little or no regard to the proprietary name but be content when they ask for and obtain "aspirin" of whatever origin or manufacture. On the other hand it may equally be that a buyer of a packet of cigarettes will attach great importance to the brand or source of manufacture and will therefore pay particular regard to the name on the packet. Thirdly, I think it would be both legitimate and useful for witnesses of the kind I have mentioned to state what, having regard to their own business experience, would be the effect on their own minds of seeing, say, "Ferodo" aspirins or "Ferodo" cigarettes. These witnesses could not properly give in evidence their opinion on the question what others might think on the hypothesis that the brand name was applied to aspirins or cigarettes, for the conclusion of that matter is the function of the court or of the Comptroller-General. But there would, in my judgment, be some value in statements by these trade witnesses themselves of what would be their assumptions on the hypothesis mentioned, and what would be their reasons. On the other hand, the production of a sheaf of affidavits sworn by members of the public, each stating what he or she would think on seeing a bottle of Ferodo aspirins or a packet of Ferodo cigarettes, and why, would in my judgment be of negligible value. Twenty-five such statements might appear impressive in weight of paper but would represent so slight a fraction of the whole population as to be no guide to popular opinion and no reliable measure of the notoriety of the mark.

The result therefore is that the appeal fails and must be dismissed with costs.

Solicitors: *Coote & Co.; Solicitor to Board of Trade.*

J. L. D.

COHEN J.

1945

Mar. 27.

In re FEATHER.
HARRISON *v.* TAPSELL.

Will—Construction—Evidence—Statement by testator—Admissibility—"Legatee"—Whether annuitant included.

By his will, made in 1937, a testator bequeathed 2,000*l.* to an employee "if still in my employ and not under notice." The employee was called up for military service in 1940, and at the time of the testator's death, in 1943, was still serving in the army. A summons having been taken out by the trustees of the will to determine (inter alia) whether the employee was in the employ of the testator at the date of the testator's death, evidence was adduced by one of the trustees that the testator affirmed to him, in 1942, that the employee was still in his employ:—

Held, that, while the statement could not be accepted as evidence of intention, it could be accepted as confirming the evidence given by the employee that he remained in the employ of the testator.

Herbert v. *Reid* (1810) 16 Ves. 481, followed.

The testator also directed his trustees to give to his housekeeper (*a*) sufficient money to enable her to keep a certain house and garden in proper condition until they should be sold by the trustees and (*b*) an annuity of 52*l.* during her life.

By cl. 15 of the will the trustees were directed to divide the residue (thereinafter called his "trust estate") "amongst such "of the legatees hereinbefore named as may be living at my death "and in such proportions as the trust estate bears to the amount "of the legacy bequeathed to such legatees respectively."

Held, that the testator did not intend that the term "legatees" should include any persons in addition to those who received pecuniary legacies, and that the housekeeper was not entitled to participate in the residue.

Bromley v. *Wright* (1849) 7 Ha. 334, considered.

ADJOURNED SUMMONS.

The testator, George William Feather, by his will, dated October 14, 1937, gave the following directions: Clause 10: "I give legacies . . . . free of legacy duty as follows: (*a*) To

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"the said W. T. J. Tapsell . . . . the sum of 2,000*l.* if still in "my employ and not under notice . . . ." Clause 13: "I "direct my trustees to give to my housekeeper Miss Sarah "Jane Mitchell sufficient money to enable her to keep Thorn "Villa occupied and the garden properly kept until my "trustees shall sell the said dwelling-house and the furniture "therein . . . ." Clause 14: "I give the following annuity "free of legacy duty and of income tax at the standard rate "for the time being in force:—To the above mentioned Miss "Sarah Jane Mitchell 52*l.* during her life . . . ." By cl. 15 he gave and bequeathed the residue of his real and personal effects "not hereinbefore specifically bequeathed" to his trustees upon trust for sale and conversion as therein mentioned and directed that they should "out of my ready money pay "my debts funeral and testamentary expenses the legacies "hereinbefore bequeathed and any legacies that may be given "by any codicil to this my will and legacy duty payable in "respect thereof and after making provision for the said "annuity I direct my trustees to divide the residue (hereinafter "called 'my trust estate') amongst such of the legatees "hereinbefore named as may be living at my death and in "such proportions as the trust estate bears to the amount of "the legacy bequeathed to such legatees respectively."

A summons was taken out by the trustees of the will to determine (inter alia) whether W. T. J. Tapsell was entitled to the legacy contained in cl. 10 of the will and to participate in the testator's "trust estate"; and whether Sarah Jane Mitchell was entitled to participate in the testator's "trust "estate."

Sir Norman Touche for the plaintiffs.
Landman for W. T. J. Tapsell.
Lindner for Sarah Jane Mitchell.
G. A. Russo and *Geoffrey Cross* for other parties interested.

COHEN J., delivering judgment, after considering the other evidence in support of the claim of W. T. J. Tapsell, continued: I must, however, refer to a particular paragraph in the affidavit of one of the trustees, in which he says: "On or about the "16th July, 1942, during an interview I had with him, the "testator discussed with me certain matters relating to his "said will, and the legacy of 2,000*l.* to the said W. T. J. Tapsell "was mentioned. I suggested to the testator that he should "alter the terms of his will with regard to the defendant Tapsell "to remove any doubt there might be as to whether the said "defendant, being then in the army, could be considered as "still in the employ of the testator. The testator at this "interview emphatically affirmed that the defendant Tapsell "was still in his employ." Mr. Cross disputed the admissibility of that paragraph, and I think it is clear that it cannot be admitted as evidence in any way varying the terms of the will. On the other hand, the case of *Herbert* v. *Reid* (1), is authority for the proposition that a statement by the testator is admissible in determining the question of fact whether W. T. J. Tapsell was in the service of the testator at the time of the testator's death. The headnote in that case is in the following terms: "Legacy to A if in the testator's service at the time of his "decease. Parol evidence admitted to show that, though she "had quitted his house, she continued, and was considered by "him as, in his service; and upon that evidence the legacy was "established." That legacy was a legacy to the plaintiff "if in his service at the time of his decease." There was tendered in evidence in support of the bill a deposition by a Mr. Dutton that the testator had said: "I have still regard "for her"—that was the plaintiff—"I do not owe her the "least ill-will; for I have left her 500*l*. by my will; and when "I get better in health, she is to come home again." This evidence was objected to, and, dealing with that objection, the Lord Chancellor said: "The first objection to the evidence "is, that these three witnesses are proposed to prove the "declarations of the testator; that according to the rules "of evidence, particularly with reference to the statute, "evidence of this kind cannot be read. Certainly it could not "be read if proposed to prove the testator's intention, that the "plaintiff should have the legacy, though she should not be in "his service at his death; but, if to determine, whether "in fact she had left the service, it is clear that the declarations "of the testator, one of the parties to the contract, may prove, "whether he considered her as having left it, and whether she "had left it in fact: especially where, whatever belief the "defendants suggest, they produce no evidence or fact beyond "the mere circumstance, that she quitted the house." It seems to me that here, while I cannot accept the paragraph in question as evidence of intention, I can accept it as confirming the conclusion which I should be inclined, even apart from it, to

(1) (1810) 16 Ves. 481, 488.

draw from the affidavit of Mr. Tapsell, that he remained in the service. I, therefore, propose to declare that he is entitled to the legacy of 2,000*l.* free of legacy duty as mentioned in cl. 10 (*a*) of the said will. I think it is common ground that if I so decide he would be entitled to participate in any property comprised " in my trust estate."

There is also the question whether Sarah Jane Mitchell is entitled to participate in the distribution under cl. 15, by virtue of either of the directions in cl. 13 and cl. 14. Mr. Lindner rested his case in the first instance on cl. 13, placing cl. 14 in the background. I must, as he contended, approach this question bearing in mind what was said by Knight Bruce V-C. in *Cornfield* v. *Wyndham* (1) namely " ' Legacies ' is a word " under which annuities bequeathed may, without impropriety, " be comprised. It has, familiarly and colloquially, a more " restricted meaning. It may receive, according to the " circumstances, either the more general or the more restricted " sense." That is carried a stage further by Turner L.J. in *Heath* v. *Weston* (2) where he said : " The general rule is that " the word legacies will comprehend annuities." In the end it must be a question of construction on the facts of each case to determine whether, on the true construction of the will, the expression " legatee " and the expression " legacy " in the direction as to division includes anything except pecuniary legatees.

The case which is nearest to this case is *Bromley* v. *Wright* (3). There, real and personal estate were given to trustees on trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife to sell and convert the same into money and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants and specific legacies to others. The residue was given in these terms : " And as to all " the rest, residue, and remainder of the several trust monies " and premises which shall remain in the hands of my said " trustees or the survivors or survivor of them, under the " devises and bequests aforesaid, after duly satisfying and

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(1) (1845) 2 Coll. 184, 187.

(2) (1853) 3 De G. M. & G. 601, 606.

(3) (1849) 7 Ha. 334.

" paying the several annuities and legacies hereinbefore " bequeathed, I give, devise, and bequeath the same and every " part thereof unto and between all and every the several " legatees hereinbefore named (except Elizabeth Ashley Bailey " and her family, Mrs. Sly and her daughters, and Mrs. Kennel), " and that the same shall be divided and paid by my said " trustees or the survivor of them to the several legatees, " rateably and in proportion to the amount of the respective " legacies bequeathed to them in and by this my will." It is to be observed that Mrs. Kennel had only received an annuity and not anything else which fell within the description of legacy. No meaning could, therefore, be given to the words " and Mrs. Kennel " unless the court took the view that in their absence Mrs. Kennel, by virtue of her annuity, would have shared in the distribution. On this aspect of the case Wood V-C. said this (1): " The next case is that of the " annuitant for life, Elizabeth Bromley. That the testator " intended her to share in the residue is in the highest degree " improbable. Throughout his will he speaks both of legacies " and annuities. The legacies he calls ' legacies or sums of " ' money ' ; the annuities he calls ' annuities or yearly sums.' " In the case of the Cowleys, he substitutes a legacy of 500*l.* " for their annuities. In the case of Elizabeth, he makes no " substitution, but leaves her in possession of an annuity for " life. And he uses the word ' amount ' by which to measure " the proportion of the residue which his residuary legatees " are to take—a term not applicable to an annuity. But " against this I must set the established proposition, that, in a " case of this description, annuities are legacies unless the context of the will shows that such was not the intention of the " testator : *Nannock* v. *Horton* (2) and *Sibley* v. *Perry* (3). " But the exception in the residuary clause of Mrs. Kennel from " the legatees enforces by the very words of the testator the " sufficiency of the word ' legacy ' to include the annuity. By " excepting an annuity for life from the legatees, to whom he " gives the residue, he declared that an annuity for life is in " his vocabulary a legatee of a share of the residue ; and I " cannot think that the word ' amount,' though in strictness " inapplicable to annuities, is of such unbending force as to " justify me in excluding from a share of the residue an annuitant who would otherwise be entitled to share in it : *Nannock*

(1) 7 Ha. 340.

(2) (1802) 7 Ves. 390.

(3) (1802) 7 Ves. 522.

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" v. *Horton* (1)." I think that is all I need read from that judgment. The assistance I derive from it in this case is the use the Vice-Chancellor made of the word " amount." I find that expression here, and I agree entirely, with respect, with what the learned Vice-Chancellor said, that, prima facie, that word refers to a pecuniary legacy and not to an elaborate calculation such as would have to be made if I were to hold that the term " legatees " included annuitants and legatees or legacies and annuities within the meaning of this clause.

The matter does not rest on that alone, because the testator, after making provision for the annuity, directs the trustees to divide the residue among the legatees " hereinbefore named." Although it is true that that may be only a method by which the testator indicated that the trustees were to have power to appropriate a fund, I think, reading the clause as a whole, that the testator does not intend in this clause the term " legatees " to include anything but those persons who receive pecuniary legacies. That being so, I propose to declare that Sarah Jane Mitchell is not entitled to participate " in the " property called by the testator ' my trust estate '."

Solicitors: *Ward, Bowie & Co., for A. V. Hammond & Co., Bradford; Gibson & Weldon, for Butterfield & Winstanley, Keighley; Corbin, Greener & Cook, for Morrish, Nelson & Co., Leeds.*

J. L. D.

VAISEY J.

1945

May 1, 11.

In re FRY, DECEASED.

REYNOLDS *v.* DENNE AND OTHERS.

Will—Absolute gift of residue—Name clause—Beneficiaries to " take " and continue to bear " surname of testator—Validity.

A testator by his will left the residue of his estate in trust for the eldest son of the tenant for life of his estate on his attaining the age of twenty-one years or, failing him, for the tenant for life's eldest daughter who should attain that age or marry. By cl. 9 he provided: " It shall be a condition appurtenant to the taking of " the gift of my estate . . . . that the person so taking shall take " and continue to bear my surname." The tenant for life married after the testator's death and had two children, both daughters.

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(1) 7 Ves. 390.

The elder daughter married and, by this summons, asked whether the condition was void or effectual and, if it was effectual, when the plaintiff had to "take" the testator's surname, over what period she had to "continue to bear" it and whether it would be a sufficient taking of his surname for her to bear it in conjunction with her own married surname and in front of (i.e., before) it.

Held (1.) that the condition was a condition subsequent: and the clause was void for the following reasons: (*a*) it was repugnant to the antecedent absolute gift, since there was no gift over on breach; (*b*) even if it could be operative, it would infringe the rule against perpetuities, and (*c*) it was contrary to public policy, being coercive and quasi-punitive, and intended to force the plaintiff to take and use the testator's surname both while unmarried and when married.

Bennett v. *Bennett* (1864) 2 Dr. & Sm. 266; and *Musgrave* v. *Brook* (1881) 26 Ch. D. 792, considered.

ADJOURNED SUMMONS.

By his will, dated June 24, 1916, a testator, inter alia, gave the residue of his estate in trust for the eldest son of the tenant for life of his estate on his attaining the age of twenty-one years, or, failing him, for the tenant for life's eldest daughter who should attain that age or marry. Clause 9 provided: "It shall "be a condition appurtenant to the taking of the gift of my "estate . . . . that the person so taking shall take and "continue to bear my surname." On January 22, 1919, the testator died. On September 18, 1920, the tenant for life married and on May 21, 1922, her elder child, a daughter, the plaintiff on this summons, was born. On May 23, 1924, her younger child, also a daughter, was born. On September 13, 1942, the plaintiff married. Her husband did not wish to take the testator's surname, either by itself or in conjunction with his own, whether before or after it, but was willing to do so if necessary. By this summons, which was taken out on February 6, 1945, the plaintiff asked whether the condition was (*a*) wholly void and inoperative, or (*b*) effectual and operative to some and if so what extent and, if so, that it might be determined at what date the plaintiff had to "take" the testator's surname and over what period she had to "continue to "bear" it, and whether it would be a sufficient taking of the name for the plaintiff to bear the testator's surname in conjunction with her own married surname and in front of (i.e., before) it. The defendants to the summons were the trustees of the will, the testator's widow, and the executors of the will of the testator's father, who, with the widow, were entitled on intestacy.

Christie K.C. and *Wilfrid Hunt* for the plaintiff. The condition is void. It is described by the testator as "appur-" tenant" and certainly is not a condition precedent. It is merely precatory, and should be so treated: *Vandeleur* v. *Sloane* (1): *In re Evans' Contract* (2); *In re Talbot* (3). There is no gift over, and the condition is therefore inconsistent with, and repugnant to, the absolute gift: *Musgrave* v. *Brook* (4). It is not merely "take," nor yet "shall have taken," but "take and continue to bear." So worded, the court will construe it strictly: *In re Greenwood* (5) per Romer L.J., and, if possible—and here it is not only possible, but correct—as a condition subsequent: *Bennett* v. *Bennett* (6). In *Gulliver* v. *Ashby* (7) the condition was that the beneficiaries should change their surname, and Lord Mansfield said (8): ". . . . in such a " case (of so silly a condition as this is) the court would " perhaps incline against the rigour of the forfeiture"; and, in a footnote to the word "silly," the reporter observes: "This " was never so treated either before or since this case." The condition is void, also, for perpetuity. The plaintiff was born after the testator's death. The condition is so worded that, once she has taken his surname, she must "continue to bear" it or forfeit her interest: *In re Drax* (9); and, even if she took the surname, she might at any moment, perhaps even more than twenty-one years after the testator's death, choose to drop it. It is not possible, moreover, to read into the condition an implied gift over in favour of the widow and the testator's father's executors: *In re Engels* (10): see also *In re Chardon* (11). Finally—a point on which there is, as yet, no authority—the condition is contrary to public policy. Such a condition might well prove to be in restraint of marriage, for a prospective husband might not be willing to take his wife's real maiden name, let alone one which the caprice of a testator forces on her for life. If the plaintiff took the testator's surname and her husband kept his own, the confusion might well be unending, and the annoyance and inconvenience certainly would be intolerable. If, however, the condition is effectual, the plaintiff will not sufficiently comply with it by adding the testator's surname before her own married surname: *D'Eyncourt* v. *Gregory* (1).

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(1) [1919] 1 I. R. 116.
(2) [1920] 2 Ch. 469.
(3) [1932] I. R. 714.
(4) (1881) 26 Ch. D. 794.
(5) [1903] 1 Ch. 749, 758.
(6) (1864) 2 Dr. & Sm. 266.
(7) (1766) 4 Burr. 1930
(8) Ibid. 1941.
(9) (1906) 75 L. J. (Ch.) 317.
(10) [1943] 1 All E. R. 506.
(11) [1928] Ch. 464.

Montgomery White, for the trustees, did not take part in the argument.

Jopling for the widow and the testator's father's executors. On the true construction of the clause, it is possible to read into it an implied gift over in favour of the widow and the father's executors. What has to be done here is to read the provision as a whole, ascertain what it means, and then see if the law allows effect to be given to it. All that it is saying is that the plaintiff must take the testator's surname and continue to bear it. She can do that, for there is nothing in law to prevent a married woman from using a surname not her husband's. The condition is not a condition subsequent, but a condition precedent. What the testator is saying is: "You shall not "take this gift unless and until you have first taken my "surname." His use of the word "appurtenant" shows that he knew at any rate something of legal terminology, and it is quite possible that he knew the word "precedent," but did not know how to pronounce it and therefore did not know its meaning and so did not use it. The condition cannot fairly be described as contrary to public policy. Authors, artistes, members of Parliament, and publicists and professional and social workers of every kind quite often keep their maiden names and are known by them in their social as well as in their working life. That the plaintiff will have to "take and "continue to bear" the testator's surname if she is to inherit, need not prevent her from saying, should occasion arise, that she is married to her husband, and telling his name. There need be neither confusion nor embarrassment. She must either take the testator's surname or not take the gift of his estate. If she does not take the surname, the estate will go as on intestacy.

Cur. adv. vult.

1945. May 11. VAISEY J. read a judgment in which he stated the facts, and continued: Nothing is said in the will as to what is to happen to the estate in case of the non-fulfilment of the condition contained in cl. 9. So far as the language goes, the clause is, in my judgment, mandatory and imperative, in contrast with other expressions of mere precation to be found elsewhere in the will. I think that the obligation intended to be thereby imposed upon the "taker of the gift" of the estate was meant to arise at, and not before, the taking of it in possession at the death of the tenant for life: see *In re Greenwood* (1). As to the word "appurtenant," I think it means annexed to, or inseparably connected with, and if the testator had been asked whether he was creating a condition precedent or a condition subsequent he would probably have said that it was neither, but somehow concurrent. In my judgment, however, it must be regarded and treated as a condition subsequent; see *Bennett* v. *Bennett* (2). It was rather faintly suggested in argument that the clause contains two severable conditions, one to take, and the other to continue to bear, the name, but, if so, the former condition, standing alone, involving a merely formal, and possible merely momentary, assumption of the name would have well merited the adjective "silly" applied somewhat sweepingly to this type of defeasance provision by Lord Mansfield in *Gulliver* v. *Ashby* (3), in a passage of which the reporter, in a footnote, indicates his personal disapproval.

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(1) (1875) 1 Ch. D. 441.

I find at least three reasons for holding that the clause is void, and must be treated as though it had been expressed in terms of mere precation, as in *Vandeleur* v. *Sloane* (4); *In re Evans' Contract* (5); and *In re Talbot* (6). The clause is, first, in my judgment void on the ground of repugnancy to the antecedent absolute gift, there being no gift over on the breach of the condition; see *Musgrave* v. *Brook* (7). The testator has said pretty clearly what he expects the plaintiff to do, but has been silent as to what is to be the consequence of her not doing it. Secondly, the clause is void as infringing the rule against perpetuities, or, to put the matter more accurately, it would, if it could be given any operation at all, necessarily involve an infringement of the rule. The plaintiff's life was not "in being" at the testator's death, and I read the attempted obligation of continuing to bear the surname as not admitting of any intermission during the whole of the rest of her life. It follows, therefore, that the event of discontinuance, upon which (as is suggested) the estate would revert to the heir at law and next of kin, might well occur beyond the permissible limit of time. The plaintiff, though not a life in being at the testator's death, could have been given a life interest conditional on her taking, and determinable on her discarding, the testator's surname, but then the interest by law given in remainder to the persons entitled on an intestacy would have vested immediately, for what it was worth, at the death of the testator, and the possible prolongation beyond such "permissible limit" of uncertainty as to the time when, and precise event on which, the interest in remainder would become an interest in possession would involve no infraction of the rule. If, however, in such a case the uncertainty had been as to which of several beneficiaries was to take the interest in remainder expectant on the life interest, the rule would have invalidated the disposition. Here the plaintiff is given not a life interest but an absolute interest, and it might well happen that more than twenty-one years after the termination of every life in being at the testator's death it would still be uncertain whether the estate would ultimately belong to the plaintiff through her continuing to bear the surname or would go over on her discontinuance of it.

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(1) [1903] 1 Ch. 749.
(2) 2 Dr. & Sm. 266.
(3) 4 Burr. 1930, 1941.
(4) [1919] 1 I. R. 116.
(5) [1920] 2 Ch. 469.
(6) [1932] I. R. 714.
(7) 26 Ch. D. 794.

There is the further point that if, in such a case as this, an implied gift over in favour of those entitled on an intestacy could be read into the will, the absence of an express gift over would have been immaterial in many of the cases in which it has been regarded as vital. On this aspect of the matter, I need only refer to the recent decision of Uthwatt J. in *In re Engels* (1). At first sight, the case of *In re Chardon* (2), might seem to have some bearing on the case, but when read in the light of the explanatory note in the appendix to Tudor's Charitable Trusts, 5th ed., pp. 701 to 703, it has, I think, no relevance to it at all.

Thirdly, I have formed the view that the clause is, as regards the plaintiff, void on the ground of public policy. I put this view forward with hesitation, remembering that the courts have always been reluctant to extend the application of the principle, and there being, so far as I know, no authority on the point. A "name clause," or a "name and arms clause," is a well recognized kind of provision, and when applied to a man, though it is usually felt to be irksome, does not seem to me, pace Lord Mansfield, to deserve any more derogatory epithet than that. There may be circumstances in which it could with absolute propriety be applied to a woman: if, for example, she were the sole surviving representative of some notable family. No such circumstances exist in the present case, and we have here a provision deliberately designed to ensure that the plaintiff should take and use the same surname both throughout her spinsterhood and also while married—to a man who would almost certainly have a different surname, and possibly to a succession of men with a number of different surnames. I am quite well aware that many women, both married and unmarried, make use of pen-names and theatre-names, and there is, so far as I know, nothing to compel a married woman to use her husband's surname, so that the wife of Mr. Robinson may, speaking generally, go by the name of Mrs. Smith if she chooses to do so. None the less, the use of different surnames by a man and his wife cannot fail to be productive of many embarrassments and inconveniences, not only to themselves, their children and relatives, but to their friends and acquaintances, and indeed to society generally. The wife's use of the prescribed name, unlike the pen-name or theatre-name, must be a continuous use of it for all purposes, and it is not, I think, too much to say that her life might be one long series of dilemmas and predicaments. I say nothing about identity cards and ration cards and other temporary war-time regulations, restrictions and requirements, and I will merely give by way of example the signing of the registers when the husband and wife visit hotels, and the entry of particulars when the births of their children are registered.

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(1) [1943] 1 All E. R. 506. (2) [1928] Ch. 464.

I understand that in the present case the plaintiff's husband is willing, though reluctant, to change his name to the testator's surname if the plaintiff is obliged to do so, but not every husband, still less every prospective husband, could be expected to be equally accommodating and sensible, and whether or not the clause could be said to be actually in restraint of marriage, I think that a provision calculated to produce consequences so undesirable as those which I have tried to indicate, by the coercive and quasi-punitive method of a defeasance, ought to be regarded as inoperative on public grounds. The precedent books show that the right form of a name-clause where the beneficiary is or may become a married woman is to place the obligation not upon her alone but upon her husband as well. I hold, therefore, that the clause is wholly void and inoperative. The costs of all parties, as between solicitor and client, will be paid out of the capital of the testator's residuary estate.

Solicitors: *Finnis, Downey, Linnell & Price; Ellis & Fairbairn.*

K. R. A. H.

In re SLAUGHTER.
TRUSTEES CORPORATION, LIMITED *v.* SLAUGHTER.

VAISEY J.

1945

June 6.

Will—Construction—Power of appointment—Life interest in settled fund —" To any wife who may survive him "—Appointment by deed in favour of wife—Subsequent divorce on wife's petition—Death of former husband.

A testator, who settled a share of his estate in favour of a son and his children, gave his son a power by deed or will to appoint a life or lesser interest in the fund to or for the benefit of any wife of his who might survive him. The son married, and three years later exercised the power by deed and irrevocably appointed a life interest in the fund after his death to his wife. Three years later the marriage was dissolved on the wife's petition, and shortly afterwards the son died :—

Held, that the appointee, at the date when she survived the appointor, being no longer the latter's wife, was not a proper object of the power, and the appointment in her favour was ineffective.

In re William's Settlement [1929] 2 Ch. 361, followed and applied.

Bullmore v. *Wynter* (1883) 22 Ch. D. 619, doubted.

ADJOURNED SUMMONS.

By his will, dated January 25, 1916, Sir William Capel Slaughter created a trust fund and settled it upon trust to pay the income thereof to his wife during her life, and then upon trust to pay such income to his son Edward Slaughter during his life, and subject thereto for the latter's children at twenty-one or marriage. The will gave power to Edward Slaughter by deed, revocable or irrevocable, or by will or codicil, to appoint a life or less interest in the settled fund " to or for the benefit " of any wife of his who may survive him." The testator died in March, 1917. On April 29, 1931, Edward Slaughter married the defendant Mrs. Slaughter (then Miss Wilson), and on June 20, 1934, in exercise of the power, he executed a deed irrevocably appointing a life interest in the fund to her if she should survive him. In 1937, a petition for divorce was presented by Mrs. Slaughter against her husband. The marriage was dissolved and the decree was made absolute on July 12, 1937. There was one child of the marriage, the defendant Gillian Slaughter, now twelve years of age. Edward Slaughter died on October 7, 1937. Lady Slaughter, the testator's widow, died on October 23, 1944.

The summons was taken out by the plaintiffs, as trustees of the will, to determine the question whether, in the events which had happened, Mrs. Slaughter, on the death of her former husband, became entitled, subject to the life interest of the testator's widow, to a life interest in the settled fund, notwithstanding that she had divorced her husband.

N. C. Armitage for the plaintiffs.

Jopling for the defendant, Mrs. Slaughter. Apart from authority Mrs. Slaughter is entitled under the appointment. She was a qualified recipient of the interest at the date of the appointment. She was the wife of Edward Slaughter, and she survived him. Her interest ought not to be defeated because she divorced him. The decision of the Court of Appeal in *In re Williams' Settlement* (1) is against my contention. In that case, however, the husband divorced his wife, and the latter was claiming under the appointment. An earlier decision the other way, which was not overruled by the Court of Appeal is *Bullmore* v. *Wynter* (2). That is, in my favour and can be distinguished from *In re Williams* (1). See also *Bosworthick* v. *Clegg* (3).

Montgomery White for Gillian Slaughter, the infant defendant. Mrs. Slaughter is not entitled under the appointment, as she was not within the power. She had not only to be the wife of the appointor, but also to become his widow when he died, and having divorced him she did not comply with that condition. The case is governed by the decisions in *In re Williams' Settlement* (1) and *Bosworthick* v. *Clegg* (3). The words used in the latter case are indistinguishable from those in the present. It cannot have been the testator's intention that more than one wife should be entitled under any exercise of the power of appointment. *Bullmore* v. *Wynter* (2) was wrongly decided, and is indistinguishable from the other two cases on the facts.

VAISEY J. having stated the facts, continued: It seems to me that the question is one of construction, the problem being to ascertain, "Yes" or "No," was Mrs. Slaughter a wife of the appointor who survived the appointor? I think there is a great deal that might be said in favour of the proposition that when the appointment is made, as it is made here, by a deed, the status of wife, if then existing, makes the appointee a proper object of the power, and that all that she has to do, in order to

(1) [1929] 2 Ch. 361.

(2) (1883) 22 Ch. D. 619.

(3) [1929] W. N. 133; 45 T. L. R. 438.

enjoy the benefit of the interest appointed, is to survive the appointor. In this case it might have been, though it was not, the fact that the appointment was made as part of the marriage consideration, and it seems rather strange that the lady should be precluded from exercising her right of seeking dissolution of her marriage except at the cost of losing the interest which had been appointed to her. But, in my view, such an argument is not open in this court, for I am of opinion that the case is governed by, and indistinguishable from, first, the decision of Maugham J. (as he then was) in *Bosworthick* v. *Clegg* (1), and secondly, the judgment of the Court of Appeal in *In re Williams' Settlement* (2), affirming the decision of Eve J. I was asked to have regard to the case of *Bullmore* v. *Wynter* (3), and if that case had stood alone it might, in my opinion, have justified my deciding this case the other way. Having regard, however, to the observations which were made upon that case by Kay J. in *In re Morrieson* (4), I feel very grave doubt as to the extent to which *Bullmore* v. *Wynter* (3) could be regarded as a satisfactory authority, even in a case in which the words were, as they are not here, identical. Kay J. went so far as to say that he did not understand the reason of the decision, and that if the case had come before him he would have decided it the other way.

I am therefore bound in this case to decide the matter adversely to Mrs. Slaughter and to declare that upon the true construction of the testator's will, and in the events which have happened, the income of the trust fund is not, by virtue of the appointment made by the deed of June 20, 1934, payable to the first defendant, by reason of the fact that the marriage to her former husband, Edward Slaughter, was dissolved in his lifetime, on her petition. I order that the costs of all parties of this application be taxed as between solicitor and client and raised and paid out of the capital of the fund in question.

Solicitors: *Slaughter & May; Dawson & Co.*

(1) [1929] W. N. 133; 45 T. L. R. 438.

(2) [1929] 2 Ch. 361.

(3) 22 Ch. D. 619.

(4) (1888) 40 Ch. D. 30.

H. L. L.

ROMER J.

1945

June 2, 5.

PHILLIPS *v.* BUTLER.

Vendor and purchaser—Public auction—Sale—Memorandum—Signature written before payment of deposit—Payment of deposit by cheque posted on following day—Auctioneer's authority to sell and contract—Purported withdrawal by vendor—Duration of auctioneer's authority—Law of Property Act, 1925 (16 *Geo.* 5, *c.* 20), *s.* 40, *sub-s.* 1.

Property was sold by auction subject to special conditions, which provided that the National Conditions of Sale should apply so far as they were not inconsistent with the special conditions, and that the deposit should be ten per cent. of the purchase money. The National Conditions provide that immediately after the sale the purchaser shall pay the deposit and complete and sign the memorandum endorsed on the special conditions. On the sale two copies of the memorandum were completed, the auctioneer signing one and the purchaser the other. The purchaser was without his cheque book and offered to get it, but the auctioneer, who knew him as a man of means and integrity, declined his offer and told him he could post a cheque for the deposit on the following day. The purchaser did so, but before the cheque reached him the auctioneer had received from the vendor a message purporting to withdraw his authority to exchange the memoranda of the contract and to accept the deposit. The purchaser in the present action claimed a declaration that there was a concluded contract for the sale of the property and an order for specific performance of it. For the vendor it was contended that it was a term of her contract of agency with the auctioneer that the latter should not sign a memorandum or otherwise contract to sell until a deposit had been paid, and, accordingly, that there was no memorandum within the meaning of s. 40, sub-s. 1, of the Law of Property Act, 1925 :—

Held, (1.) that an auctioneer's authority to sign a memorandum arises as soon as the contract is concluded, namely, on the fall of the hammer, and does not depend on part performance of the contract by the payment of the deposit by the purchaser ; (2.) that the memorandum, although it was a receipt for money which had not yet been paid and was therefore in the nature of an escrow, was a good memorandum within s. 40, sub-s. 1, of the Law of Property Act, 1925, and that the purchaser was therefore entitled to specific performance of the contract.

Observations on the duration of an auctioneer's authority: *Chaney* v. *Maclow* [1929] 1 Ch. 451, considered.

Quaere, whether, if the decision had depended on whether the auctioneer, as between himself and the vendor, had the right to decline the purchaser's offer to get his cheque book, it could have been held that he had not allowed payment of the deposit to be postponed for a time longer than was necessary.

WITNESS ACTION.

On July 27, 1944, property owned by the defendant was offered for sale by public auction in accordance with printed particulars and special conditions. The special conditions provided, inter alia, that the sale was subject to them and to the National Conditions of Sale, 13th ed., so far as not inconsistent with them, and that the deposit should be ten per cent. of the purchase money and should be paid to the auctioneers as stakeholders. Clause 1, sub-cl. 3, of the National Conditions of Sale, provide that the purchaser shall, immediately after the sale, pay the deposit (if any) mentioned in the special conditions, and complete and sign the memorandum endorsed thereon. On each print of the particulars and special conditions was endorsed a form of memorandum of contract of sale with blanks to be filled in. The property was knocked down to the plaintiff for 1,100*l*. Two copies of the memorandum were then completed, whereunder it was agreed that the plaintiff was declared the purchaser of the property for 1,100*l*. subject to the accompanying conditions of sale, 110*l*. having been paid to the auctioneers as a deposit. The plaintiff signed one copy, the auctioneer the other. The plaintiff had not in fact brought his cheque book, but the auctioneer, knowing him well as a man of means and integrity, declined his offer to go home and get it—which he could easily have done—saying that it would be quite in order if a cheque were posted to the auctioneer at his office on the following day. The plaintiff duly posted the cheque, which reached the auctioneer's office early on July 28, but not until after the auctioneer had received from the defendant's solicitor a message on behalf of the vendor purporting to withdraw the auctioneer's authority to exchange the contract and accept the deposit. The defendant subsequently directed the auctioneer to return the cheque to the plaintiff, but he refused to do so and, in September, 1944, the cheque was cleared and the auctioneer held the money for whoever should be entitled to give him a receipt for it.

By the present action the plaintiff claimed a declaration that there was a concluded contract for the sale of the property in the terms of the memorandum, and an order for specific performance thereof.

Winterbotham for the plaintiff. There is a concluded contract in this case. The law on the authority of an auctioneer is correctly stated in Halsbury's Laws of England, 2nd ed., vol. 1, p. 699, para. 1150, in the following terms: "The auctioneer, "in the absence of special circumstances, is, by virtue of his

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" employment, impliedly the agent of both the vendor and the " purchaser to sign the contract or a note or memorandum " thereof to satisfy the requirements of the Law of Property " Act, 1925, in the case of land, and of the Sale of Goods Act, " 1893, in the case of goods, both of which statutes apply to " sales by auction. The implied authority cannot be revoked " after the conclusion of the bidding either by the vendor or " by the purchaser. It must, however, be exercised at the " time of the sale or while the transaction of sale is still in " being, and the auctioneer has no authority to sign on a " subsequent day, or on a sale otherwise than by auction." In Dart on Vendor and Purchaser, 8th ed., at p. 187, it is stated: " The auctioneer . . . . becomes the agent of the purchaser to " sign the memorandum on the fall of the hammer"; in Sugden on Vendor and Purchaser, 14th ed. (1862), at p. 13: " We may " premise that whatever is done by the auctioneer will be held " to be done by the principal"; and in Fry on Specific Performance, 6th ed., at p. 256: " It is now clearly decided " that, at sales by auction, auctioneers are agents of the " purchaser as well as of the vendor." It appears to be established that neither party can revoke the auctioneer's implied authority once the bidding is over: *Bell* v. *Balls* (1) and, if it could be revoked after he had made a contract and signed a memorandum, his authority would be quite meaningless. The authority lasts for a reasonable time, the limit put on it being that it must be exercised during the transaction of sale: *Chaney* v. *Maclow* (2). He can accept payment of the deposit by cheque: *Farrer* v. *Lacey, Hartland & Co.* (3) —which is precisely what has been done in this case—provided that the cheque is not post-dated. In no text-book or decided case is there one single word to suggest that the auctioneer's authority to bind the vendor by a memorandum is contingent on his receiving a deposit. The memorandum in the present case is perfectly good as such: *Papè* v. *Westacott* (4), and satisfies s. 40, sub-s. 1 of the Law of Property Act, 1925.

Pennycuick for the defendant. The contract is unenforceable. True, it was made by bidding and acceptance, but there is no memorandum in writing of it within the meaning of s. 40, sub-s. 1, of the Law of Property Act, 1925. The auctioneer did not and could not properly sign it, for he had no authority to bind the defendant until he had received the deposit.

(1) [1897] 1 Ch. 663.
(2) [1929] 1 Ch. 451.
(3) (1885) 31 Ch. D. 42
(4) [1894] 1 Q. B. 272.

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He could not part with her interest on credit, which was what he purported to do. Even if the signature could be treated as having been written after the deposit was paid, on July 28, that would not make the contract enforceable: first, because the very thing that the National Conditions of Sale say must be done, namely, payment of the deposit immediately after the sale, would not have been done, and, secondly, because by the day after the sale, when the deposit was paid, the auctioneer's authority to sign had gone: *Mews* v. *Carr* (1). He cannot sign when he has no longer the authority to do so; and he cannot go outside the National Conditions of Sale if the sale is subject to them.

ROMER J. The law as to an auctioneer's authority is stated with undoubted correctness in Halsbury's Laws of England, 2nd ed., vol. 1, p. 699, para. 1150, Dart on Vendor and Purchaser, 8th ed., p. 187, and Williams on Vendor and Purchaser, 4th ed., p. 32. The question is whether there has been compliance with s. 40 of the Law of Property Act, 1925. Prima facie, it would appear that there has, for there is a memorandum of sale signed, or purporting to have been signed, by the auctioneer on the vendor's behalf and dated July 27, 1944. Therefore there exists a memorandum in writing, evidencing a sale, containing sufficient particulars of the sale and signed by the auctioneer on the vendor's behalf. It is said, however, that whilst that may be the prima facie result of the memorandum it is not its true result, because the auctioneer had not the vendor's authority to sign the memorandum before receiving the deposit, and that, as the deposit was received on the next day, July 28, the memorandum, although dated July 27, cannot be treated as having been signed on that day by a duly authorized agent of the vendor.

At a sale by auction a contract comes into being when the hammer falls, but neither party can enforce it unless " . . . . " some memorandum or note thereof is in writing, and signed " by the party to be charged or by some other person thereunto " by him lawfully authorized," as s. 40, sub-s. 1, requires. The only function of the memorandum is to provide evidence, which does not affect the terms of the contract but simply makes it enforceable. I cannot see any logical ground for suggesting that an auctioneer's authority to sign a memorandum on his vendor's behalf arises, not as soon as the contract

(1) (1856) 1 H. & N. 484.

Considered. JAMES LAMONT & Co. Ld. *v.* HYLAND Ld.
[1950] 1 K. B. 585

C. A.

1945

July 3, 5.

Lord Greene M.R., du Parcq and Morton L.JJ.

In re SAMUEL.

Practice—Notice of appeal—Abandonment of appeal consented to by respondent—Subsequent decision to proceed with the appeal—Doubt as to possibility—Practice Direction, 1938 (*see Annual Practice,* 1944, *p.* 1301).

Under the practice laid down in 1938 (see note to Or. 58, r. 8, in Annual Practice, 1944, p. 1301) an appellant who is sui juris may submit an application to have the appeal dismissed and on this application being initialled by the President of the court the appeal will be dismissed with costs.

It follows that, notwithstanding the signing by both parties of a form of consent to an appeal being abandoned, the notice of appeal remains on foot; and the court will allow the appeal to be proceeded with on this notice of appeal, unless it considers that by reason of what has happened the respondent has changed his position disadvantageously:—

Quaere, whether in such a case the court would allow a new notice of appeal to be given.

As under the existing practice an appellant can obtain the dismissal of an appeal without securing the respondent's consent, a consent signed by both parties cannot set up any contractual relationship.

Watson v. *Cave* (1881) 17 Ch. D. 23, discussed and not followed having regard to the change in the practice.

APPEAL from Evershed J. (1).

After Evershed J. had dismissed the action by the trustee in bankruptcy of a bankrupt against a solicitor who at the direction of the bankrupt delivered to her jewellery in his custody for her with the knowledge of her bankruptcy and of the intended sale of the jewellery, the trustee gave notice of appeal. Subsequently he decided to abandon the appeal owing to shortage of funds for paying possible costs and his solicitors informed the respondent's solicitors of this and asked for the respondent's consent. On June 18, 1945, the respondent's solicitors replied as follows: "We confirm our "conversations on the telephone on Friday last and to-day, "when you informed us you had been instructed to withdraw "this appeal. As requested we enclose herewith form of "consent to the appeal being dismissed on the terms that your "client pays our client's costs thereof, which you informed us "you would lodge with Appeal Cause Clerk to-morrow. We "doubt whether the matter can be disposed of in this way, as "it seems to us that it will have to be formally mentioned to

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(1) [1945] W. N. 127.

"the Court of Appeal, but you will be able to ascertain this "to-morrow, and we shall be glad if you will kindly let us "know." On June 21, 1945, the respondent's solicitor wrote pressing for information. Meanwhile the trustee in bankruptcy had obtained a guarantee in respect of the costs of the appeal and wished to proceed with the appeal. The trustee's solicitors telephoned the respondent's solicitors to this effect, but the respondent refused to withdraw his consent to the appeal being dismissed. On June 28, 1945, the trustee's solicitors wrote to respondent's solicitors as follows: "We received "your letter of the 21st instant and telephoned you thereon "the following day, when you informed us that you were not "prepared to withdraw your consent to the appeal being dis-"missed. We then informed you and this letter is to confirm "that under the circumstances we are not proceeding with "the appeal but at the hearing (which we believe is in the list "for next Tuesday, the 3rd prox.) the trustee would ask "that leave be given to serve a fresh notice of appeal."

Aronson for the trustee in bankruptcy. The trustee having sought to abandon the appeal and obtained the respondent's consent, the trustee, who now desires to proceed with the appeal, feels in view of *Watson* v. *Cave* (1), that his proper course will be to allow the appeal to be dismissed and ask leave to issue a new notice of appeal, although the time for doing so has expired. It is true that a new practice was laid down in 1938, set out in a note to Or. 58, r. 8 (Annual Practice, 1944, p. 1301) by which an abandonment of an appeal must be initialled by the President of the court when the appeal stands dismissed. That step was not taken here, but presumably the parties can agree that the appeal shall not be prosecuted. It is true that the respondent here did nothing to his detriment so that there is no consideration for such an agreement.

[LORD GREENE M.R. Even under the old practice an appeal could not be withdrawn. It had to be brought before the court, who then dismissed it.]

That is so. [He referred to *In re Downing* (2) and *Norton* v. *London & North Western Ry. Co.* (3).] The only difficulty arises from *Watson* v. *Cave* (1). The trustee asks to be allowed to proceed with the appeal on the existing notice of appeal or, alternatively, for leave to issue a new notice of appeal.

(1) (1881) 17 Ch. D. 23.
(2) (1891) 8 Morrell 302.
(3) (1879) 11 Ch. D. 118.

Considered. JAMES LAMONT & CO. LD. *v.* HYLAND LD. [1950] 1 K. B. 585

C. A.

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Aronson for the trustee in bankruptcy. The trustee having sought to abandon the appeal and obtained the respondent's consent, the trustee, who now desires to proceed with the appeal, feels in view of *Watson* v. *Cave* (1), that his proper course will be to allow the appeal to be dismissed and ask leave to issue a new notice of appeal, although the time for doing so has expired. It is true that a new practice was laid down in 1938, set out in a note to Or. 58, r. 8 (Annual Practice, 1944, p. 1301) by which an abandonment of an appeal must be initialled by the President of the court when the appeal stands dismissed. That step was not taken here, but presumably the parties can agree that the appeal shall not be prosecuted. It is true that the respondent here did nothing to his detriment so that there is no consideration for such an agreement.

[LORD GREENE M.R. Even under the old practice an appeal could not be withdrawn. It had to be brought before the court, who then dismissed it.]

That is so. [He referred to *In re Downing* (2) and *Norton* v. *London & North Western Ry. Co.* (3).] The only difficulty arises from *Watson* v. *Cave* (1). The trustee asks to be allowed to proceed with the appeal on the existing notice of appeal or, alternatively, for leave to issue a new notice of appeal.

(1) (1881) 17 Ch. D. 23.
(2) (1891) 8 Morrell 302.
(3) (1879) 11 Ch. D. 118.

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Gallop for the respondent. The appeal should be dismissed and the court ought not to grant leave to issue a new notice of appeal. That is the effect of the decision in *Watson* v. *Cave* (1) which still applies: see also *Tod-Heatley* v. *Barnard* (2). When it is agreed to withdraw an appeal it means notice of appeal, and but for *Watson* v. *Cave* (1) the only power of the court would be to dismiss the appeal.

LORD GREENE M.R. The trustee in bankruptcy was minded to appeal from an order of Evershed J. and he duly served a notice of appeal. He discovered, however, that he had not the funds necessary to enable him to prosecute the appeal without running the risk of having to pay costs out of his own pocket, and in those circumstances he decided that he would not go on with it. His solicitors informed the respondent's solicitors of that decision on the telephone, and the respondent's solicitors submitted a form of consent under which the parties were expressed to consent to the appeal being dismissed on the terms "that the appellant do pay the respondent's costs of "the appeal, to be taxed if not agreed." That was signed by both solicitors. That procedure was in accordance with the modern practice, which is to be found set out in the Annual Practice, 1944, p. 1301, in the notes to Or. 58, r. 8. The practice direction there set out took the place of an earlier direction, and has finally settled what the practice ought to be. It provides: "where an appellant is sui juris and does not wish "to prosecute an appeal he may present a request signed by "his solicitor stating that he is sui juris and asking to have the "appeal dismissed, in which case (subject to the request "being initialled by the President of the court), the appeal "will be dismissed and struck out of the list, and an order "will, if necessary, be drawn up directing payment of the "costs by the appellant, such costs to be taxed in case the "parties differ." In the ordinary course the document in this case did not require the signature of the respondent's solicitors. Under that practice an appellant who does not wish to go on with his appeal can, by unilateral action, procure the dismissal of his own appeal, on the terms, of course, that he pays the costs. If he wishes that it be dismissed on some other terms—for example, without costs—obviously the consent of the other side is required; and the practice direction so provides.

For some reason which has not been fully explained to us,

(1) 17 Ch. D. 23.

(2) [1890] W. N. 130.

the appropriate document never came before the President of this court to be initialled, and, accordingly, the appeal was never dismissed. A few days afterwards the trustee succeeded in obtaining from the creditors an indemnity which satisfied him, he decided that he wished to go on with the appeal, and his solicitors informed the respondent's solicitors to that effect. On June 21, the respondent's solicitors wrote a letter to the trustee's solicitors in which they said that they had made inquiries, "as a result of which we are advised that it will "not be possible for this appeal to be withdrawn without "formal application being made to the Court of Appeal." That, as a matter of fact, was wrong. The appeal would have been dismissed if the consent had been initialled by the President of the court. They go on to say: "We shall be "glad to receive written notice of your client's intention to "withdraw the appeal, and no doubt at the same time you "will inform us when your counsel proposes to make the "necessary application to the Court of Appeal so that we can "instruct our counsel accordingly." Then they ask to hear by return of post, otherwise they would deliver their briefs. On the face of that letter it is made clear that in the view of the respondent's solicitors the consent which had previously been signed would not be effective to procure the dismissal of the appeal and that an application to the court should be made. But on June 28, the trustee's solicitors wrote saying that they had by telephone informed the respondent's solicitors, "and "this letter is to confirm that under the circumstances we "are not proceeding with this appeal but at the hearing which "we believe is in the list for next Tuesday (the 3rd prox.) the "trustee will ask that leave be given to serve a fresh appeal." That is not a very accurately worded letter, because "to serve "a fresh appeal" is, of course, nonsense. What was really meant—and it was just a slip, no doubt—was "to serve a "fresh notice of appeal" and when the letter says that they are not proceeding with this appeal, that can only mean, "We are not proceeding with this notice of appeal."

That being the position, the matter comes before us. Mr. Aronson, on behalf of the trustee, opened his argument by saying that he was applying for leave to serve a fresh notice of appeal. It is to be observed, however, that the old notice of appeal, so far as the court is concerned, is still alive. No order has been made dismissing the appeal: the notice is still a live notice unless there be some reason which would induce the court to say that in the circumstances the trustee should not be allowed to proceed with that notice. This was pointed out to Mr. Aronson, and he was invited to argue that it was still competent to him, notwithstanding what had happened, to proceed with his oiginal notice of appeal. The court granted Mr. Gallop (on behalf of the respondent) an adjournment, because that obviously was not the kind of argument that he came here to meet. We have now had the benefit of his observations at the adjourned hearing. Quite naturally and quite properly, he opposed the application, and also argued that, in view of what had happened, it was not competent to the trustee to go on with the original notice of appeal and that in the circumstances no leave to serve a fresh notice of appeal should be given, the time having lapsed for service of a notice of appeal.

The position is a very curious one, and it has been necessary to examine the practice a little closely. In times past it used, I think, to be common practice for appellants to withdraw their appeals. This could only be done by leave of the court. There have been from time to time different views taken as to what is the proper order, but it is now quite clearly settled that the phrase " withdraw the appeal " is not the right phrase, nor is an order giving leave to withdraw an appeal the right order to make. The right order to make is an order dismissing an appeal. An appeal either succeeds or it fails. If it fails because the appellant abandons it, the one and only order that can be made is that it should be dismissed, and the court's records are thus kept in order. In the old days it was necessary, if an appellant did not wish to go on with his appeal, to come to the court and obtain the necessary order, which sometimes, apparently, took the form of leave to withdraw his appeal and sometimes took the form of dismissal of the appeal. But the modern practice is what I have stated. We were referred to *Watson* v. *Cave* (1) decided in this court in the year 1881, when the practice was that an appeal could only be disposed of on application to the court. The court consisted of James and Lush L.JJ. There the appellant had notified the respondent that he proposed to withdraw his appeal and asked for his consent to the withdrawal, and submitted to pay the costs. That consent was given, but the appellant subsequently changed his mind because, he said, he was under a misapprehension as to a material fact. The appeal came on,

(1) 17 Ch. D. 23.

and the respondent's counsel objected to its being heard on the ground that the defendant had withdrawn his notice. James L.J. thought it would be pessimi exempli to allow such a withdrawal of the appeal as had been given to be rescinded. He pointed out that such action on the part of the appellant if allowed, might result in injustice to the respondent, who might have acted on the faith of the withdrawal. There was no evidence one way or the other whether he would suffer any such ill effects. The lord justice went on to say: "If "the appellant afterwards"—that is, after the acceptance by the respondent's solicitors of the notice to withdraw—"wished to withdraw from his withdrawal and return to his "former position, his proper course would have been to apply "for leave to give fresh Notice of Appeal. If there had been "any mistake of fact under which the first notice was given, "the court might have acceded to such an application, but at "present we know nothing about the facts." That is putting the matter on the basis that the court will not allow its process to be manipulated in such a way as to produce a possible injustice; and the matter was left quite open by James L.J.'s remarks, giving the appellant leave to put himself right by applying for leave to give a fresh notice of appeal. It is to be observed that he did not put the matter on the ground of contract or suggest that the proper order would be one dismissing the appeal. Lush, L.J. on both those points expresses himself in this way. He says that the proposal amounted to a contract which was binding on the parties. I feel some difficulty about that, but I am not prepared to say, nor am I called on to say, whether under the old practice the view that there was a contract made by such actions as took place in that case was correct. I will assume that it was. But it seems clear that under the modern practice it would not be right to treat such a notice as was given in this case, even when it was agreed to by the other side, as constituting a contract. I cannot see that there is any consideration for it; and that, to my mind, is made perfectly clear when it is remembered that under the modern practice an appellant, provided he can obtain the initialling of the President of the court, can, by his own unilateral action, procure the dismissal of his appeal. There is nothing to be done by the respondent to produce that result. On the other hand, the initialling by the President of the court is not done as a matter of course. The practice was introduced to save the expense of applications to the court, which in ninety-nine cases out of a hundred were unnecessary. But the court is the master of its own procedure, and merely because one party asks for an order, or both parties concur in asking for an order, the court is not constrained to make the order asked for at any rate without knowing the facts. There is therefore no room under the modern practice for the conception of a binding contract.

A further difficulty arises under the judgment of Lush L.J. He concluded his judgment by saying: "I am of opinion that "when the proposal of the appellant had been accepted "there was a contract constituted from which the appellant "was not at liberty to recede. The appeal must be dismissed "with costs." But the court then, on the application of the appellant's counsel, gave leave to give notice of motion to enlarge the time for appealing, as the time had expired. It does not appear whether there was an order dismissing the appeal with costs, as Lush L.J. thought ought to be done. My difficulty is to see how, if the appeal was dismissed, leave could be given to the appellant to revive the dismissed appeal by serving a new notice of appeal. It is to be noticed that all the court did was to give leave to apply to have the time for appealing enlarged; and there is a note in the report that no motion to enlarge the time was made. So it never came up for argument whether it was competent to the court to allow the appeal to be revived by serving a new notice of appeal. I cannot myself see how such an order could have been made. Under the present practice, when once an order has been drawn up and entered, pursuant to an application by the appellant duly initialled by the President of the court to dismiss the appeal, there is an end of the appeal, and I cannot see that the court would have jurisdiction to grant leave to serve a fresh notice of appeal in respect of an appeal which is brought to an end by the order dismissing it.

The position here is that the appeal is still on foot as it has never been dismissed. It is competent for us to consider, in such circumstances, whether or not something has happened which would justify the court in saying that the trustee ought not to be allowed to proceed with his appeal, for the reason that the respondent had in some way changed his position. The court can always prevent an abuse of its own process. But Mr. Gallop, very fairly, disclaimed any such suggestion. His client has not in any way altered his position, and it will be no hardship from that point of view if the original notice of appeal is proceeded with. That being the position, I cannot see that we should be justified in saying that the trustee was precluded from proceeding under the existing notice of appeal. But if we had taken the view that he ought not to be allowed to proceed under his original notice, we should have had to consider the further question whether in the circumstances he should be allowed to serve a fresh notice on the footing not that the appeal had been dismissed but that the original notice had now become waste paper by virtue of its withdrawal. If we were driven to consider that question, I cannot see, in view of the fact that the respondent is not damnified, why we should not be justified in giving leave to serve another notice of appeal out of time.

However, I do not think it is necessary to go so far as that because, the appeal being still on foot, I can see no reason on the facts of this case for refusing to allow the trustee to treat the original notice of appeal as effective. I think that the letter of June 28 from the trustee's solicitors really means: " We are not proceeding with this notice of appeal " (that is, the original notice of appeal) " but we are going to ask leave to " serve a fresh notice of appeal." That is not a notice that they are going to submit to their appeal being dismissed; on the contrary, it seems to say the exact opposite: " We are " going to treat our appeal as still an effective appeal but the " particular piece of paper by which we seek to bring the " appeal before the court will not be the original piece of paper " which we served but a new piece of paper which we wish to " serve and which we shall ask the court's leave to serve." In those circumstances, the appeal is still competent and must be heard in due course.

In view of *Watson* v. *Cave* (1) I wish to make it clear, if I have not already done so, that under the new practice an appellant wishing to abandon his appeal can do so without any consent from the other side, and the fact of giving notice to the other side and obtaining the quite unnecessary signature of the solicitors on the other side does not in any way create a contractual relationship. Further, if in such a case a court came to the conclusion that the original notice of appeal ought not to be proceeded with, the proper order for the court to make would not be to dismiss the appeal, because once dismissed there can be no fresh notice of appeal. The proper course for the court to take would be, if the circumstances

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(1) 17 Ch. D. 23.

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warranted it, to refuse to allow the original notice of appeal to be proceeded on and then take into consideration whether it would grant leave to serve a new notice of appeal. I cannot think that such a question would really be likely to arise in practice because, if there was no reason to refuse leave to serve a new notice of appeal, it would seem to follow that there could be no reason for insisting that the original notice of appeal should be treated as defunct.

In the circumstances of this case, the appeal must be proceeded with.

DU PARCQ L.J. I agree.

MORTON L.J. I agree.

Solicitors: *Spector & Spector; Forsyte, Kerman & Phillips.*

H. C. G.

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July 9.

Lord Greene M.R., du Parcq and Morton L.JJ.

In re CARLTON.

Alien—Naturalization—Foreigner resident in England—" Every child . . . " shall be deemed to be a naturalized British subject "—" During " infancy "—Infant children—Naturalization Act, 1870 (33 *&* 34 *Vict., c.* 14), *s.* 10, *sub-s.* 5.

An alien who was over twenty-one years of age at the date when his father obtained a certificate of naturalization, does not, under s. 10, sub-s. 5, of the Naturalization Act, 1870, automatically become a naturalized British citizen. The word " child " in s. 10, sub-s. 5, means " infant child."

APPEAL from Cohen J. (1).

The applicant R. G. Carlton was born in Roumania in 1887, came with his parents to England in 1894, and continued to reside here with them until 1912. On April 18, 1910, his father was granted a certificate of naturalization. The applicant claimed that, although he was then over twenty-one years of age, he became naturalized as the result of the grant to his father of a certificate of naturalization, under s. 10, sub-s. 5,

(1) Ante p. 280.

of the Naturalization Act, 1870 (1). He claimed that before the grant of naturalization he and his parents were stateless, although the father was described in the certificate as a Roumanian subject. Cohen J. said that the question depended on the meaning to be placed on "child." The meaning of the word must in every case depend on the context in which it appeared and he had come to the conclusion that in s. 10 "children" or "child" meant infant children or infant child. A change of nationality involved an important change of status on which a person of full age was entitled to make his own decision. Under s. 7, the minimum period of residence in this country necessary to qualify an alien for naturalization was five years. If the applicant's contention were right he could have obtained naturalization on his father doing so, if he had resided in England during infancy, notwithstanding that he had been living in a foreign state since he attained twenty-one. For these reasons, even if there were nothing more, he should have been inclined to hold that in its context in s. 10 "child" meant infant child. He was supported in this view by reference to the cross-heading which on authority he could make use of. The applicant appealed.

On the appeal, the Court of Appeal did not consider the question whether the cross-heading could be used and argument on this point is not therefor reported.

The applicant in person. The material date for the purpose of this case is the date when my father applied for naturalization. That was in 1907.

[*Harman K.C.* The application of 1907 was rejected and naturalization was granted in 1910 as the result of a second application in 1909.]

The date of the application is, under s. 7 of the Naturalization Act, 1870, the material time, and the same is true under s. 10, sub-s. 5.

[LORD GREENE M.R. The material date is that when naturalization was granted to your father.]

The issues arising from Cohen J.'s judgment are (I.) what is the true meaning of "child," (2.) what is the meaning of "during infancy." A large number of Acts are made applicable only to children under specified ages, and where "child" is used without further definition, it is the context which implies the age. Where child is limited to infant child there is a context to cause it: *R.* v. *Inhabitants of St. John Bedwardine* (1) where the expression is "poor child." But child is not always construed as any child under twenty-one years of age. In ordinary speech child has two meanings (1.) young person, and (2.) offspring; and "offspring" is not limited as to age: see Stroud's Judicial Dictionary (2nd ed.), p. 30, and the definition in the Oxford dictionary in which the meaning of "son or daughter at any age or offspring" is given. The possessive words "of such father" in s. 10, sub-s. 5, shows that by child is meant offspring. [LORD GREENE M.R. It is hard to see why there should be an automatic naturalization of persons quite able to take steps to naturalize themselves.] That is a matter which Parliament could have made clear. Residence during infancy was a material point. A difference was made by the British Nationality and Status of Aliens Act, 1914, by which it is only children named in the certificate of naturalization who become naturalized; but under the Act of 1870 naturalization of children coming within s. 10, sub-s. 5, is automatic. Cohen J. omitted to take notice that under the sub-section the test is whether the child has been resident "during infancy." The sub-section means that every child who is resident and has been resident during infancy becomes naturalized.

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(1) Naturalization Act, 1870, s. 10, sub-s. 5, provides: "Where "the father, or the mother being a "widow, has obtained a certificate "of naturalization in the United "Kingdom, every child of such "father or mother, who during "infancy has become resident "with such father or mother in "any part of the United Kingdom, "shall be deemed to be a "naturalized British subject."

Harman K.C. and *Danckwerts* for the Attorney-General.

In *R.* v. *Superintendent of Albany St. Police Station* (2) it was laid down that a child born in a foreign state did not obtain the status of British nationality by the mere fact that his father was a naturalized British subject. It is under the Act of 1870 that naturalization became a transmissible status and regard must be had to the statute alone to see to what extent. For an alien to apply for naturalization under the Act he must be of full age. Section 10 when it talks of women and children cannot mean every child, as otherwise provisions as to women would be superlative. Everyone is a child of some person. What is contemplated is children under age. "Child" is admittedly a word of ambiguous meaning and it must be construed according to the context, but when contrasted with woman it can only mean a child who is not of age. The legislature cannot have intended to change the status of persons of full age automatically, no option is given to contract out. The words "during infancy" in the sub-section are redundant. Section 5 of the British Nationality and Status of Aliens Act, 1914, provides for the inclusion in a certificate of naturalization of children under twenty-one, if thought fit. [They referred to *Jaffe* v. *Keel* (1).]

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(1) (1833) 5 B. & Ad. 169.

(2) [1915] 3 K. B. 720.

Danckwerts, following on the same side: Another view is that in s. 10, sub-s. 5, the words "have been resident" refer to a punctum temporis, being the moment when the father obtains a certificate of naturalization; and the words "during "infancy" refer to the same time, so that the child who becomes naturalized must be an infant child who has been resident when the father obtains his certificate.

The applicant replied.

LORD GREENE M.R. The applicant is seeking to establish the proposition that he acquired British nationality when his father, in the year 1910, was granted a certificate of naturalization under the Naturalization Act, 1870. Before Cohen J. the facts were agreed, or assumed to be, that the applicant was one of several children of parents who had no citizenship, or in other words, were stateless, as the modern expression is, and that he himself at his birth was also stateless. The hearing also proceeded on the footing that, as stated in the applicant's affidavit, the certificate of naturalization, which was dated April 18, 1910, was granted pursuant to an application made in the year 1909. The applicant now seeks to put in an affidavit sworn subsequently, in which he says that the application was made not in 1909 but in 1907. That is disputed by counsel on behalf of the Attorney-General. We looked at the affidavit de bene esse, but, in my opinion, the new fact which the applicant seeks to put in evidence has no bearing on the question which we have to decide. The actual certificate of naturalization was not before Cohen J. but we have been handed a certified copy of it, which recites that the applicant's father was a Roumanian subject, that being, of course, contrary to what the applicant himself had thought—I do not think it matters—and that he was married and had seven children under age residing with him. The applicant, an older child, was not mentioned for the simple reason that at that date he was over twenty-one. Then the certificate follows the usual form. His father having thus acquired British nationality in the year 1910, the applicant asserts that, although at the date of that certificate he had attained his majority, he nevertheless must be deemed to have acquired the status of a naturalized British subject by virtue of s. 10, sub-s. 5, of the Naturalization Act, 1870. It is to be noticed in passing that that Act was repealed by the British Nationality and Status of Aliens Act, 1914, and a new method of dealing with children of persons seeking naturalization was introduced, in that, under the practice under that Act, the name of any child whom it is desired to include in the naturalization of its parent is mentioned in the certificate, if the Secretary of State thinks fit. In the Act of 1870, no such provision existed. The alteration of the status of children was automatic. Where the parent obtained a certificate of naturalization, an automatic naturalization of children took place.

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(1) [1916] 2 K. B. 476.

Section 10 of the Act of 1870 began with the following words: "The following enactments shall be made with respect to the "national status of women and children." Then follow a number of sub-sections dealing with married women and widows and children, and sub-s. 5, says: "Where the father, or the "mother being a widow, has obtained a certificate of naturali-"zation in the United Kingdom, any child of such father or "mother who during infancy has become resident with such "father or mother in any part of the United Kingdom, shall be "deemed to be a naturalized British subject." The applicant, relying on that sub-section, says: "My father obtained a "certificate of naturalization in the United Kingdom. I am a "child of my father. I had become resident with my father "while I was still an infant. I therefore automatically became "a British subject when my father was naturalized, notwith-"standing the fact that at that date I had passed the age of "twenty-one." Cohen J. rejected that contention, and in his judgment he examined the question of construction which arose in two ways. He first of all examined the construction of the section quite apart from a cross-heading, to which I have not yet referred, and he then went on to say that his opinion on construction was reinforced and indeed made quite certain, by a reference to the cross-heading, which, on an examination of the authorities, he held that he was entitled to make. The cross-heading is "National status of married women and "infant children," and if it is legitimate to construe the section in relation to that cross-heading, it would result in the conclusion, unless there was some clear provision to the contrary, that the children with whom the section was dealing were infant children. The applicant has argued, that on the authorities we ought not to use the cross-heading for the purpose of construing the substance of the section. I must not be taken as in any way suggesting that Cohen J. took a wrong view of the law on that subject. From what I recollect of my own experience, both at the bar and on the bench, courts have accepted and examined without question the cross-headings, but I am not going to make any pronouncement in this court on this occasion as to the legitimacy of that practice, because I do not think that it is necessary to do so. If I were to go into it I should have to examine the authorities which have been cited to us. I therefore leave the matter without any comment on it, save, as I have said, that I must not be taken to suggest that Cohen J. took a wrong view.

I am content to accept his judgment on the question of construction without any reference at all to the cross-heading. His view on that part of the argument appears to me to be quite impossible to criticize, but I should like to add a few words of my own, and to mention a point which Morton L.J. suggested in the course of the argument. He pointed out that the section began as follows: "The following enactments shall "be made with respect to the national status of women and "children." The word "children" there clearly does not mean all children, because everybody is a child in one sense, as being the child of a parent. It is clearly, therefore, of some more limited meaning. I may myself add that, in a context such as "women and children," you would normally construe the word "children" as meaning, at any rate, something other than a fully-grown person. It must always, of course, depend on the context. As I pointed out in argument, if in a shipwreck the captain of a ship says, "Women and children first," he does not mean to include the child of a parent who has attained perhaps the age of forty years. Clearly he would be thinking of very much smaller children. The question how young a child must be in order to come within such an expression is a different matter. Similarly, here, the question is: Does the word "child" in sub-s. 5, include a child of any age or is it limited to some particular age? Mr. Carlton pointed out, and quite rightly, that in a number of statutes reference is made to children of a particular age, or children of not more

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than a particular age. But that really does not assist him. What we are concerned with is the word child in this particular context. Bearing in mind that the section purports in terms to deal with the status of women and children, when we come down to sub-s. 5, and find the word " child," to what sort of child is it referring? Is it referring to everybody who is in the relationship of a son or a daughter of a father, or is it referring to persons in that relationship who would come under the meaning of the word " child " if that word means infant child? I agree with Cohen J. that, in the context of this section, it applies only to infant children. If it were not so the most extraordinary results would follow. The idea that your national status is to be fixed for you by somebody else, or by your relationship to somebody else, has never been accepted to cover persons who are sui juris. By the Act of 1870 a wife acquires the same nationality as her husband. At common law, marriage, if I remember aright, did not affect the nationality of a wife, but she acquired the nationality of her husband, whether she liked it or not, under the Act of 1870. The same happens with a child. Automatically a child, when born, has a nationality conferred on it, not of its own volition but by the operation of law. The argument of the applicant is that this sub-section has had the effect of imposing on persons of full age British nationality, whether they want it or not, because their father has himself become naturalized. That seems to me a most extravagant and unnecessary result, for the simple reason that, when once the child becomes of full age, he can elect whether he will acquire the same nationality as his father or whether he will elect to retain his original nationality. If the contention were right, you might get the curious result, with regard to a child of a foreigner, who lived with his father during the whole of his minority, that if after he had attained twenty-one the father became naturalized, that child would immediately acquire British nationality. It might happen that the father did not acquire his certificate of naturalization till many, possibly fifty years afterwards, and to his surprise, and possibly to his indignation, the son would find British nationality forced upon him. I am quite unable to construe this sub-section so as to produce that result.

The applicant particularly relied on the words, " every child " of such father or mother who during infancy has become " resident with such father or mother." Those words are certainly rather unfortunate, and, indeed they have given rise to acute controversy among text-book writers. The late Professor Dicey in The Conflict of Laws said that the words were deplorably vague, and he raised certain questions and discussed some possible examples to show how vague they are. But the vagueness which he discovers there relates to totally different questions from that which the applicant has raised. He does not suggest for a moment that the children referred to in the sub-section might include a child of more than twenty-one. Indeed, in his book he divides the subject-matter with which he is dealing in regard to s. 10, between "married "woman" and "infant." Mr. Danckwerts has suggested a construction of those words "during infancy" which is attractive and gives some force to them which otherwise they would apparently not have. He says that the words "has "become resident" refer to a point of time, namely the date when the certificate is granted, and that it is at that date that resident infants must be looked for. On that construction the phrase "during infancy" might be paraphrased as meaning "being an infant"—"every child of such father or mother "who being an infant has at the date when the certificate is "granted become resident with such father or mother." That is an attractive proposition but I do not think it necessary to decide whether it is right. It would not be desirable to do so unless it was forced upon us, for the very simple reason that this construction might in other cases and upon other facts produce very controversial results.

I am prepared to decide this appeal on the footing on which Mr. Harman was prepared to argue it, viz., that the words "during infancy" are redundant. I find no difficulty in deciding the case on that assumption, having regard to the quite ridiculous results which would follow from any other construction, namely, that a person whose nationality of origin was foreign might find himself, after he became of full age, and perhaps years later, becoming a British subject without any act or volition of his own. What I have added to Cohen J.'s reasons may not carry the matter very much further, and I myself should be satisfied to accept the short and cogent judgment of the learned judge.

du Parcq L.J. I also agree with the judgment of Cohen J., though I wish to express no opinion on the question of the importance to be given to cross-headings and side-notes. I do not wish to be taken as differing at all from the reasons given by the learned judge and by my Lord. I only wish to say that I think (and I hope I shall not be making the problem more difficult by saying this) that one may perhaps arrive at the right conclusion in some such way as this :—I have asked myself the question : How does a man become resident in the United Kingdom ? For the purposes of this case, I think one may say that there are two ways in which he may become resident. He may become resident as a child under the guardianship of others by the act and the volition of his parents or guardians, or he may become resident as a person of full age by the exercise of his own choice. It seems to me that sub-s. 5 is dealing only with the former class, and that it cannot be said that a man who is of full age at the time when the sub-section falls to be applied became resident in the United Kingdom or "has become resident" in the United Kingdom, the stress being on his present residence, " during his infancy." He became so resident, I suggest, when, by the exercise of his own will as a person of full age, he elected to reside in the United Kingdom. If that is so, his position is no different from that of a man born abroad and residing there who elects to come and join his parents and live with them after he has reached the age of twenty-one. I only put that forward as a way of approaching the section, but I do not wish to differ at all from the reasons which have already been given, and may be fully sufficient, by the learned judge and by my Lord.

MORTON L.J. I agree that this appeal must be dismissed. I am quite satisfied that on the true construction of s. 10, sub-s. 5, of the Naturalization Act, 1870, and for the reasons given by the Master of the Rolls and by Cohen J., the words " every child " have no application to a person who attains the age of twenty-one years before his father obtains a certificate of naturalization. I prefer to express no opinion on this occasion as to the construction of the words " during " infancy " or the words " has become resident," or as to what effect, if any, should be given by the court to cross-headings in a statute.

Appeal dismissed.

Solicitor : *Treasury Solicitor.*

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May 29, 30, 31 ; *June* 22.

du Parcq and Morton L.JJ., Cohen J.

Revenue—Interest awarded in proceedings for recovery of debt—Income tax—Deduction—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. D., para.* 1 (*b*) ; *All Schedules Rules, r.* 21—*Law Reform* (*Miscellaneous Provisions*) *Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3, *sub-s.* 1.

A judgment for the amount of a debt with interest awarded in exercise of the power conferred by the Law Reform (Miscellaneous Provisions) Act, 1934, is satisfied by payment of the amount of the debt and of the interest less income tax.

A sum so awarded as interest is "interest of money" within para. 1 (*b*) of sch. D. to the Income Tax Act, 1918, notwithstanding that (*a*) it is awarded as compensation, (*b*) it is not a recurrent payment, and (*c*) the judgment is under s. 3, sub-s. 1, of the Act of 1934 for a single sum consisting of the debt and interest : and accordingly where it is not paid out of profits otherwise brought into charge to income tax, the debtor is bound under r. 21 of the All Schedules Rules to deduct the amount of income tax therefrom and account for it to the Crown.

Secus in the case of an award of damages, where the damages are ascertained as a matter of convenience by an interest calculation. No income tax is chargeable on the sum so awarded as damages.

In re National Bank of Wales [1899] 2 Ch. 629, disapproved by Morton L.J. and Cohen J.

APPEAL from Evershed J.

The plaintiffs, the Westminster Bank, Ld. (hereinafter called the bank), were the judicial trustees of the will of Ernest Bramwell Ridsdel (hereafter called the deceased). In his lifetime the deceased had for many years employed the defendant, Edward Harold Riches, as his solicitor to handle many of his affairs. In April, 1936, an agreement was come to between them that in consideration of the defendant's introducing to the deceased a transaction in regard to the purchase and resale of shares in J. C. & J. Field, Ld., the deceased would pay him a half-share of the profits. There was a net profit of 93,350*l.*, but the deceased concealed this from the defendant and only paid him a much smaller amount than his proper share of the profits. After the death of the deceased the defendant became aware of the real profits of the transaction and in 1942 brought proceedings against the bank for an account of his share of the profits, and consequential relief. On May 17, 1943, Oliver J. gave judgment in favour of the defendant for

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36,255*l.*, with 10,028*l.* interest, being interest at four per cent. from June 14, 1936, to date of judgment. He awarded this interest in exercise of his power under s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, on the ground that this sum of 36,255*l.* had been kept from the defendant by the fraud of the deceased. The order as drawn up was for the recovery of "36,255*l.* with 10,028*l.* interest "making together the sum of 46,283*l*," and power was given to levy execution for "such sum of money and costs." The bank paid the sum of 41,269*l.*, made up of the sum of 36,255*l.* and of 5,014*l.* only in respect of the interest, on the ground that the sum of 10,028*l.* was "interest of money" within the meaning of para. 1 (*b*) of sch. D. to the Income Tax Act, 1918, and that the bank was bound under r. 21 of the All Schedules Rules to deduct income tax at the rate of 10*s.* in the £ and account for it to the Crown. The defendant having threatened to levy execution for the sum of 5,014*l.*, the bank began proceedings on June 14, 1944, for a declaration that the judgment had been satisfied and that it was under no further obligation to the defendant in respect thereof.

Evershed J. said that if the matter rested solely on the language of s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 (1) he would have no difficulty in holding that the sum of 10,028*l.* was interest of money within para. 1 (*b*) of sch. D. to the Income Tax Act, 1918, and r. 21 of the All Schedules Rules. But it had been argued that this sum was damages, or in the nature of damages, and not interest of money so as to be subject to income tax. After reviewing a number of authorities he added that in his judgment there was no rule or principle referable to the fact that the interest awarded was by way of compensation, or to the fact that the deceased had been guilty of fraud which compelled him to hold that the interest awarded was not in reality interest. He could not accept the view that "interest" in s. 3 of the Act of 1934 meant anything different from the word "interest" as used in the Income Tax Act, 1918. Nor did the phrase

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(1) The Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, sub-s. 1, provides: "In any "proceedings tried in any court of "record for the recovery of any "debt or damages, the court may, "if it thinks fit, order that there "shall be included in the sum for "which judgment is given interest "at such rate as it thinks fit on the "whole or any part of the debt or "damages for the whole or "any part of the period between "the date when the cause of action "arose and the date of the "judgment . . . ."

"there shall be included in the sum for which judgment is "given" in s. 3 so merge the subject-matter of the award under the section with the debts that the former lost its individuality and quality. It followed that the judgment obtained against the bank by the defendant had been satisfied. The defendant appealed.

Grant K.C. and *Mustoe* for the defendant. The interest awarded was in the nature of damages for wrongful detention of the defendant's money. The essential characteristic of "interest of money" within sch. D. to the Income Tax Act, 1918, is that it should have the quality or possibility of recurrence. This sum was never accruing; it had no existence till judgment was pronounced, and it can never recur. How essential this characteristic is appears from *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (1): see also *Bond* v. *Barrow Hæmatite Steel Co.* (2) and *In re National Bank of Wales* (3). If nothing had been paid under the judgment and a writ of fi. fa. had been issued, the sheriff would have levied for the full amount of the judgment. Whatever the quality of this sum of "interest" it must be satisfied in full. On the main contention that the interest awarded was in reality damages it is material that amounts of interest awarded under either s. 28 or s. 29 of the Civil Procedure Act, 1833, were, on the authorities, awards of damages: *Cook* v. *Fowler* (4) and *Webster* v. *British Empire Mutual Life Assurance Co.* (5). The latter case makes it clear that interest is given under these sections only as damages for the wrongful withholding of money and that in such a case the interest awarded has a different quality from ordinary income and is not within sch. D. [They referred to *Sheba Goldmining Co.* v. *Trubshawe* (6); *Wilks* v. *Wood* (7); and *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.* (8), when the previous authorities were considered.] Whatever was the position under ss. 28 and 29 of the Act of 1833, it is the same under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which, while repealing the sections of the earlier Act, only enlarged the grounds on which interest could be given without changing its nature. It is not suggested that interest awarded is not taxable merely because there was a wrongful withholding; but when there

(1) [1937] A. C. 785, 795.
(2) [1902] 1 Ch. 353.
(3) [1899] 2 Ch. 629.
(4) [1874] L. R. 7 H. L. 27.
(5) (1880) 15 Ch. D. 169.
(6) [1892] 1 Q. B. 674.
(7) [1892] 1 Q. B. 684.
(8) [1893] A. C. 429.

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has been no previous accruer of interest, the interest awarded is damages and nothing else. There is no right to that interest but only a possibility that a judge may award it. [DU PARCQ L.J. Is it possible to say that even if there was no obligation or right on the part of the bank to deduct tax, the Crown has a right to levy it ?] It seems not. The duty of or right to payment in full would have to be based on the merger of the amount in the damages or judgment. [They referred to *Aman* v. *Southern Ry. Co.* (1).] Divorce cases on alimony such as *Blount* v. *Blount* (2), *Smith* v. *Shaw* (3) and *Smith* v. *Smith* (4) are distinguishable because the payments ordered to be made are annual. In *Inland Revenue Commissioners* v. *Barnato* (5) the wrongdoing was irrelevant because the interest was due anyhow. There was no question of damages. The present case is indistinguishable from *In re National Bank of Wales* (6). The distinction between interest proper and interest given mainly as damages runs through all the tax cases. It has never been suggested that the description of a payment as interest is conclusive. [They referred also to *Schulze* v. *Bensted* (7); *Sweet* v. *Macdiarmid* (8); *Inland Revenue Commissioners* v. *Ballantine* (9); *Simpson* v. *Executors of Bonner Maurice* (10); *Southport Corporation* v. *Lancashire County Council* (11); *In re Craven's Mortgage* (12); and *In re European Central Ry. Co.* (13).]

Terence Donovan for the plaintiffs. The ability of the court to make an order for payment of a sum free of tax did not arise from any presumption that the order exempted the payment from tax. An order for payment of the annual sum of 100*l.* "free of tax" is presumably an order for payment of such a sum as after deduction of tax will leave 100*l.* [DU PARCQ L.J. The early position of the Divorce Court is stated by Scrutton L.J. in *Blount* v. *Blount* (2).] The provision in the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, sub-s. 1, allowing the court to order that interest shall be "included in the sum for which judgment is given" does not give the interest a different character. Nor does it affect the matter that the judgment was for one entire sum.

(1) [1926] 1 K. B. 59.
(2) [1916] 1 K. B. 230.
(3) [1918] P. 47.
(4) [1923] P. 191.
(5) (1936) 20 Tax. Cas. 30.
(6) [1899] 2 Ch. 629.
(7) (1915) 7 Tax Cas. 30.
(8) (1920) 7 Tax Cas. 640.
(9) (1924) 8 Tax Cas. 595.
(10) (1929) 14 Tax Cas. 580.
(11) [1937] 2 K. B. 589.
(12) [1907] 2 Ch. 448.
(13) (1876) 4 Ch. D. 33, 37.

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The judgment is satisfied although the part of it attributable to interest is paid less income tax. A sheriff executing a judgment is in a different position because an official of the Crown is not liable to account for tax. No-one has ever suggested that it is impossible to go behind a judgment and if here, the Crown can say to the defendant that he has received interest under the judgment, it can also say to the bank that it ought to have deducted the amount of the tax under the Income Tax Act, 1918, All Schedules Rules, r. 21, and are accountable for it. The defendant claimed interest and was awarded interest under s. 3, sub-s. 1, of the Act which gave the court power to award interest, and to the extent of the deduction of tax they have satisfied the judgment; *Allchin* v. *Coulthard* (1). In *Smith* v. *Smith* (2) Warrington L.J. stated that the fact that a liability arose under the order of the court did not exclude the right of the Revenue to tax. The interest ordered to be paid was "interest of money" within sch. D., para. 1 (*b*), and did not fail to be "interest of money, whether yearly or "otherwise," within r. 1, to case III., of sch. D., because it was brought into existence by the judgment as a single sum, without having actually accrued over an earlier period: *Schulze* v. *Bensted* (3); *Leeds Permanent Benefit Building Society* v. *Mallandaine* (4). Lord Maugham in *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (5) cannot have meant to say otherwise. [He referred to *Michelham* v. *Michelham* (6).] It is sought to escape this view by reference to the Civil Procedure Act, 1833, ss. 28 and 29, or rather the construction put on the sections by certain authorities. The first of these is *Cook* v. *Fowler* (7), but in that case interest was not awarded under s. 28 but under the inherent jurisdiction of the court. Where the judgment was for damages for breach of contract it was natural also to call any interest awarded damages. In *Webster* v. *British Empire Mutual Life Assurance Co.* (8) interest was clearly awarded though by way of damages to compensate for loss. It is incorrect to say that this removed the obligation for income tax and the same is true under the Act of 1934. It becomes necessary to consider the matter without regard to those authorities. When a tribunal awards interest as such it is taxable, but an interest calculation may be

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(1) [1943] A. C. 607, 619.
(2) [1923] P. 191, 201.
(3) 7 Tax Cas. 30.
(4) [1897] 2 Q. B. 402.
(5) [1937] A. C. 785, 795.
(6) [1921] 1 Ch. 705.
(7) L. R. 7 H. L. 27, 30.
(8) 15 Ch. D. 169, 176.

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made simply as a measure of damages and the use of that measure does not convert the damages into interest: *Schulze* v. *Bensted* (1); *Inland Revenue Commissioners* v. *Barnato* (2); *Inland Revenue Commissioners* v. *Ballantine* (3); *Simpson* v. *Executors of Bonner Maurice* (4), where interest was clearly only a measure of damages; *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners* (5). None of these cases help the defendant in his appeal. Interest does not cease to be interest because it is in respect of a sum wrongfully withheld: *Schulze* v. *Bensted* (1). *In re National Bank of Wales* (6) is distinguishable and depended on the fact that what was called interest was really damages.

Grant K.C. in reply referred to *Griffiths* v. *Davies* (7).

Cur. adv. vult.

June 22. Their Lordships read the following judgments.

DU PARCQ L.J.: Rule 21, para. 1, of the All Schedules Rules under the Income Tax Act, 1918, provides that "Upon payment of any interest of money . . . . charged with tax under sch. D. . . . . the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of payment." Under para. 2 of the rule, provision is made for assessment to tax of the person who is bound to deduct tax under para. 1. Under sch. D., tax is to be charged on "all interest of money . . . . not specially exempted from tax." For the purposes of the present case, at any rate, there is nothing in the relevant legislation to qualify the generality of this provision.

[His Lordship then stated the facts and continued:] Two questions of importance now arise for our decision. First, is the sum of 10,028*l.*, which was awarded as interest, "interest" on which tax is chargeable under sch. D.? Secondly, if the answer to the first question is in the affirmative, was the bank bound or entitled to deduct from that sum the tax due on it, at the time of payment? It may be stated here that it was agreed that r. 19 of the All Schedules Rules had no

(1) 7 Tax Cas. 30, 33.
(2) (1936) 20 Tax Cas. 455.
(3) 8 Tax Cas. 595.
(4) 14 Tax Cas. 580, 593, 602.
(5) (1922) 12 Tax Cas. 427.
(6) [1899] 2 Ch. 629.
(7) [1943] K. B. 618.

application to the present case, since the interest in question was not payable wholly out of profits or gains brought into charge to tax.

The question whether interest awarded under the Act of 1934 is subject to tax has never been judicially decided. There is, therefore, no authority which is precisely in point. On principle, and apart from authority, I see no reason why it should not fall within the words of sch. D. When the legislature authorizes the court to award interest, it is a reasonable assumption that it intends what it calls interest to be regarded as interest for the purposes of taxation. If, indeed, there were something in the context of the statutes to show that the word was used with one meaning in the Act of 1934 and with another in the taxing Acts, such an assumption would be negatived. I can find nothing to suggest that in the Act of 1934 the word " interest " has so special a meaning that it falls outside the description " all interest of money." If the Act provided that damages might be awarded to the plaintiff and should be based on a calculation of interest, a different result might follow, but that is not the language of the Act. The provision that the interest awarded is to be " included in the sum for " which judgment is given " seems to me to carry the matter no further. Nor can I attach importance to the fact that the interest awarded is in the nature of damages or compensation. Interest, payable as such under a statute, is none the less interest because it is awarded to compensate the plaintiff for what he has lost through the defendant's delay in paying a just debt. Finally, I am by no means persuaded that this interest is excluded from the wide words of the taxing Act because, as was said, it is non-recurrent. What the judge does in a case like this is, first, to find that at a given date a certain sum was in fact due. It is then open to him to say, if he thinks fit, that, as the sum ought to have been paid at that date, it is right that it should bear interest as from that date. The order is retrospective, but I see no reason to think that a right to receive interest, in the sense in which that word is used in sch. D., may not come into being as the result of a retrospective order. If we were dealing not with a statute but with a contract which resulted in an analogous position, I think that there could be little doubt about the matter. Suppose, for instance, that A. lends 1,000*l.* to B. to be repaid at the end of three years with such interest, if any, as C. (an impartial friend acting as arbitrator) may in his discretion think it fair and just, in all the circumstances, that B. should pay. If A. received interest under C.'s award, it could hardly be doubted, I think, that it would be interest subject to tax. So far as this particular point is concerned, I see no distinction in principle between that case and the one before us.

So far I have dealt with the matter apart from authority, but I believe that I have said nothing which conflicts with the many authorities cited to us in so far as they afford us guidance. Citations from cases referring to ss. 28 and 29 of the Civil Procedure Act, 1833, are, in my opinion, of doubtful assistance. Indeed, I am of opinion that when the legislature has repealed a statute and has not re-enacted it, but replaced it with a new enactment in different terms, it is in general a salutary rule that such case law as has accumulated round the repealed statute should be regarded as having expired with it. With regard to the other authorities cited, there is little that I wish to say. The two which seemed to me most helpful to Mr. Grant's argument were *In re The National Bank of Wales* (1) and *Simpson* v. *Executors of Bonner Maurice* (2). The latter case is, in my opinion, distinguishable from the present. The sum awarded by the Mixed Arbitral Tribunal had been reached by a calculation of interest, but, under the relevant article of the treaty, that tribunal had no power to award interest as such. If that article had provided in terms for the payment of interest, the decision of the court might well, I think, have been in favour of the Crown. The view expressed by Wright J. in the case of the *National Bank of Wales* (1) seems to have been approved by Lawrence L.J. in *Simpson* v. *Executors of Bonner Maurice* (3) although other judges have somewhat pointedly declined to express approval of it. As I have said, neither it, nor, indeed, any reported decision, is directly in point, because the precise question before us comes up for decision for the first time. I propose to express no opinion on any but that precise question, and I do not find it necessary on this occasion to approve or disapprove the view expressed by Wright J. For the reasons which I have given, I am of opinion that the interest awarded to Mr. Riches was subject to tax.

The second question seems to me to be one of some difficulty. It follows necessarily from the language of s. 3 of the Act of 1934 that the sum awarded by way of interest is included in the

(1) [1899] 2 Ch. 627.
(2) 14 Tax Cas. 580.
(3) Ibid. 606.

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judgment debt. Throughout the argument I felt, and I fear that I too often expressed, a doubt whether a defendant, who is required by the order of the court to pay a judgment debt for a fixed sum (which includes interest), can be said to be making a payment of interest when he pays that sum. As between himself and the judgment creditor, there is no longer a liability to pay the interest which is included in the judgment debt. That liability is superseded by, or merged in, the judgment debt. If the judgment debtor fails to pay the judgment debt, he cannot be made liable in a further action for interest, but he is technically liable to be sued on the judgment. This is trite law, and no authority need be cited for it. Suffice it to say that the principle was stated by Baron Parke in *King* v. *Hoare* (1) and that some of the relevant cases are collected in Bullen & Leake's Precedents of Pleading (9th ed.), p. 212. Mr. Donovan, for the bank, did his best to dispel my doubts, and Mr. Grant, for Mr. Riches, said nothing to encourage them. Both learned counsel contended that if, indeed, the interest merged in the judgment debt, the result would be that the Crown would lose its right to income tax, since the interest debt would be merged for all purposes. I do not agree with this contention. The doctrine of merger, though it has many important consequences, does not operate to effect a mystical metamorphosis, binding on all the world, of all debts which together constitute the judgment debt. No one would suggest that a plaintiff who obtains a judgment against his debtor for arrears of interest (no allowance having been made for deduction of tax in the statement of claim or claimed in the defence) could defeat the right of the Crown by a plea that his debtor had paid him, not interest, but a judgment debt. It is only as between plaintiff and defendant that there is a merger, and the rights of third parties are not affected. My doubt was not as to the right of the Crown to demand tax, but as to the duty of the debtor to deduct it. A similar doubt was entertained by this court in the case of *In re Cooper* (2), but unfortunately it was not then necessary to resolve it. The relevant sections at that time were ss. 102 and 103 of the Income Tax Act, 1842. The court held that tax was not deductible at all because the interest payable was not "yearly interest," and only touched upon the question whether, if it had been deductible, it could have been deducted from a judgment debt. (See per Cozens-Hardy M.R. (3) and per

(1) (1844) 13 M. & W. 494, 504.
(2) [1911] 2 K. B. 550.
(3) [1911] 2 K. B. 554.

Buckley L.J. (1)). Although that question was left in doubt, it may be said that the Master of the Rolls and the Lords Justices did not rule out the possibility of deducting tax from a judgment debt, if certain conditions were fulfilled. I must add that, while I was considering this judgment I learned that Cassels J., sitting as vacation judge during the long vacation of 1944, had held that a judgment for an amount which included interest (payable on money for which persons acting in a fiduciary capacity were accountable) was satisfied by payment of the total amount of the judgment less income tax on that part of it which consisted of interest. The judgment was given on the hearing of a summons which was adjourned into court, but it apparently escaped the notice of the reporters. The judgment debt in question was that which the House of Lords decreed to be due in *Regal* (*Hastings*), *Ld.* v. *Gulliver and Others* (2). We are obliged to Cassels J. for furnishing us with a copy of his written judgment.

After full consideration, I am bound to say that the doubt which I have expressed seems to me to have a sound logical foundation and has not been wholly removed. When Oliver J. awarded interest he, at the same time, uno flatu, included it in the judgment debt. It ceased, therefore, to be due as interest, and I find some difficulty in saying that payment of a judgment debt is payment of interest, even when an examination of the record shows that the debt includes interest. Since interest as such is not due and owing, it is difficult to see how what the debtor pays can be called interest. I confess that I was the more attracted by this view of the matter because of the inconvenience of deciding a question of liability to income tax in proceedings in which the Crown is not a party, and the desirability of the determination of such a question by the tribunals designated for the purpose by the legislature. In the end, however, I have come to the conclusion that the view which at first attracted me is too technical. The law is not always completely logical. It is our duty to give effect to the intention of Parliament, as expressed in the relevant statutes, and, on the whole, I am prepared to concur in the opinion that Parliament intended the deduction of tax to be obligatory on the payer under r. 21, even when the interest payable was included in a judgment debt. That rule is mandatory, and it seems plain that its object is to ensure the collection of income tax, and so to protect the interests of the Crown. The judg-

(1) [1911] 2 K. B. 555.

(2) [1942] 1 All. E. R. 378.

ment, on its face, orders the payment of 10,028*l.* as interest, and the first, and, indeed, the only opportunity which the bank had of obeying the direction contained in r. 21 came when it satisfied the judgment debt. It is not, I think, in doubt that the bank complied with r. 21, para. 2, and has been, or will be, duly assessed. On the whole, therefore, I do not dissent from the view which my brethren are, I know, about to express, that the bank must be regarded as having paid the total amount of the interest and of the judgment debt to Mr. Riches. I would add that I am clearly of opinion that, if no part of the judgment debt had been paid, execution could, and should, have been levied for the total amount of the judgment, though the right of the Crown to tax would not, of course, have been affected thereby. I am confirmed in this view (which, indeed, was not contested at the Bar) by the judgment of Cozens-Hardy M.R. in *In re Cooper* (1).

In the action against the bank, the learned judge directed that the final judgment should be so drawn as to make it clear that a specific sum was awarded as interest. In similar cases I think it will be well that this precedent should be followed. I only desire to add that nothing I have said in this judgment is intended as a criticism of the arguments addressed to us, and that I wish to express my personal indebtedness to counsel for their assistance. The appeal must be dismissed with costs.

MORTON L.J.: The facts of this case have been so fully and clearly stated by the learned judge that I need not re-state them.

Was the further sum of 10,028*l.* awarded by Oliver J. "interest of money" within para. 1 (*b*) of sch. D. to the Income Tax Act, 1918? In my view it was. If one asks "Was the sum interest"? the answer would seem to be "Yes." Judgment was given for this sum under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, which empowers the court, in any proceedings for the recovery of any debt or damages, to give "interest at such rate as it thinks "fit on the whole or any part of the debt or damages for the "whole or any part of the period between the date when the "cause of action arose and the date of the judgment." Thus, that which the statute empowers is the giving of interest, and the sum in question was rightly described as "interest" in the

(1) [1911] 2 K. B. 550.

order of Oliver J. Again, if one asks the question "Of what "was it interest"? or, to use a more modern expression, "On "what was it interest"? the answer would seem to be: "It "was interest on money, i.e., on the debt of 36,255*l.* which "Ridsdel owed to Riches and ought to have paid to Riches in "1936. More particularly described, it was interest on that "debt at the rate of 4 per cent. per annum from June 14, 1936, "to May 14, 1943." It may be that neither the use of the word "interest" in the Act, nor the use of the same word in the order, is conclusive of the matter, but it is difficult to see how the sum in question could be more accurately described than by calling it "interest on money" or "interest of money." I may add that if a sum awarded under this section as interest on a debt is not liable to income tax, certain curious results would follow. For instance, if the debt for which judgment was given happened to be instalments of an annuity payable to the plaintiff, and the judge awarded interest at 4 per cent. on each instalment from the date on which it became payable, the debt itself would be subject to income tax, and yet interest on the debt would not. I have limited my observations to cases, such as the present case, where interest is awarded upon a debt, but I doubt whether any distinction can be drawn, as regards the liability to tax, between such interest and interest awarded, under the same section, on damages for which judgment is given.

On these short and simple grounds, I agree with Evershed J. that the sum of 10,028*l.* was subject to income tax, but I think I ought to explain, briefly, why I reject Mr. Grant's able argument for the defendant. Counsel's first point was that this sum is not interest of money because it is a payment of damages or in the nature of damages. He asks us to arrive at this conclusion by three stages: (*a*) Sums awarded under s. 28 or s. 29 of the Civil Procedure Act, 1833, were awarded as damages and not as interest; (*b*) The quality of sums awarded under s. 3 of the Act of 1934 is the same as the quality of sums awarded under s. 28 or s. 29 of the Act of 1833; (*c*) There are cases which show that when a sum is awarded as damages, or as a payment in the nature of damages, it is not "interest of "money" within the Income Tax Act, 1918, even if the award describes it as "interest." As to (*a*), in my view sums awarded under s. 28 of the Act of 1833 were interest. I do not think it is necessary to discuss this matter at length, as the court is not construing that section, but there is, to my mind, a very clear and significant contrast of language between s. 28, which is concerned with "debts or sums certain" and gives power to allow "interest to the creditor," and s. 29, which is concerned with actions of "trover or trespass de bonis "asportatis," and speaks of "damages in the nature of "interest." A careful study of all the cases which were cited to us by Mr. Grant leads me to the conclusion that in none of them was it decided that interest awarded under s. 28 was not interest properly so called. As to (*b*), I agree that the quality of sums awarded under s. 3 of the Act of 1934 is the same as the quality of sums awarded under s. 28 of the Act of 1833, but, in my view, sums awarded under s. 29 of the earlier Act are on a different footing. As to (*c*), I think the true view is that a sum awarded as interest does not lose its quality of interest because it is awarded as compensation to the plaintiff for being deprived of the use of his money. On the other hand, a sum awarded as damages does not cease to be damages because it is arrived at by calculation of interest on a particular sum at a particular rate for a particular period. As Lord Buckmaster said in *Glenboig Union Fireclay Co., Ld.* v. *Inland Revenue Commissioners* (1): "There is no relation between the "measure that is used for the purpose of calculating a par-"ticular result and the quality of the figure that is arrived "at by means of the application of that test."

Counsel's second point is that it is one of the essential characteristics of "interest of money" that it should have the quality of being recurrent or of being capable of recurrence. This sum of 10,028*l.*, he says, has not got this quality; there was no right to it until judgment was given by Oliver J., and that judgment was the beginning and the end of it. Counsel bases this argument upon a dictum of Lord Maugham in the case of *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (2). Lord Maugham, referring to r. 21 of the all schedules rules of the Income Tax Act, 1918, which refers to "any interest of "money, annuity, or other annual payment," said this: "In "r. 21 'annual' must be taken to have, like interest on money "or an annuity, the quality of being recurrent or being capable "of recurrence." I do not understand Lord Maugham as saying that nothing can be interest on money unless it is in fact recurrent or capable of recurrence. No doubt interest on money ordinarily has the quality of being recurrent, but I cannot see why a sum of money should be excluded from the

(1) 12 Tax Cas. 427, 464. (2) [1937] A. C. 785, 795.

description of "interest of money" or "interest on money" merely because it comes into existence for the first time under an order of the court and is interest on money in respect of a period up to the date of the order, and no further.

Finally, counsel argues that as there is a judgment for 46,283*l.*, that judgment cannot be satisfied by payment of a lesser sum. He relies on the words in the order of Oliver J., "such sum of money and costs to be levied on the goods and "chattels, etc.", and says that if execution were to be levied, the sheriff would be right in retaining the whole of the sum of 46,283*l.* I think it is true to say that if execution were levied, the sheriff would be free to retain 46,283*l.*, but I am far from thinking that by these means Mr. Riches could escape the payment of tax. However that may be, the answer to counsel's argument lies in the concluding sentence of para. 1 of r. 19 of the All Schedules Rules: "The person to whom such payment "is made shall allow such deduction upon the receipt of the "residue of the sum, and the person making such payment "shall be acquitted and discharged of so much money as is "represented by the deduction, as if that sum had been "actually paid." In the present case the deduction was made under r. 21, in which this sentence does not appear, but it was conceded before us that this sentence must be implied in r. 21 also. This concession was rightly made in view of the observation of Viscount Simon L.C., in *Allchin* v. *Coulthard* (1): "The requirement that the recipient must allow the deduction "and treat the payer as acquitted of liability in respect of this "amount is not repeated in r. 21, but must be implied." Thus the bank, having made the deduction in respect of tax, is in the same position as if the whole sum had been actually paid.

The result is that, in my view, the decision of the learned judge was correct in all respects, and this appeal must be dismissed with costs. Since writing this judgment, I have had the advantage of reading the written judgments of my brethren. As we are in agreement, I need only add that I agree with the observations which Cohen J. is about to make in regard to the case of *In re National Bank of Wales, Ld.* (2).

Cohen J.: Like Morton L.J. I find it unnecessary to add to the full and clear statement of the facts contained in the judgment in the court below. Evershed J. heard arguments from the parties, and also from the Attorney-General and

(1) [1943] A. C. 607, 619.

(2) [1899] 2 Ch. 629.

Mr. Hills as amici curiæ, and by a reserved judgment delivered on March 28, 1945, found in favour of the bank, and made a declaration that the judgment obtained against them in the King's Bench action as judicial trustees of the will of the late Mr. Ridsdel had been satisfied. From this judgment the defendant now appeals.

Before considering the arguments addressed to us, it will be convenient to refer to the relevant provisions of the Income Tax Acts. I need not read them in full, as they have been stated by du Parcq L.J. Suffice it to say that, although r. 19, para. 1, of the All Schedules Rules is not directly applicable to the present case, since it is common ground between the parties that the judgment debt was not satisfied out of profits or gains brought into charge to tax, it has been held that, although the second paragraph thereof is not included in r. 21, a similar provision binding the recipient to treat the payer as acquitted of liability in respect of the amount deducted must be implied: see *Allchin* v. *Coulthard* (1). The question, therefore, on which the decision of this appeal rests is whether the sum of 10,028*l.* included by Oliver J. in the order of the King's Bench Division under the discretion vested in him by s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, is "interest of money" within para. 1 (*b*) of sch. D. to the Income Tax Act, and r. 21 of the all schedules rules. The material portions of s. 3 of the Act of 1934 have been stated by my brethren. I shall, therefore, not re-read them, but I would say that I agree with Evershed J. that "If the matter "rested merely upon the language of s. 3 of the Act of 1934, "I confess I should feel no difficulty in concluding that the "language used meant what it said, that 'interest' meant "interest and that the sum awarded, being interest on the "principal sum of 35,255*l.* at 4 per cent. per annum from "June, 1936, to May, 1943, was interest of money within the "meaning of para. 1 (*b*) of sch. D. to the Income Tax Act, "and r. 21 of the All Schedules Rules." But Mr. Grant and Mr. Mustoe have argued that (*a*) notwithstanding the language of the section, this sum of 10,028*l.* is a payment of damages or a payment in the nature of damages, and the decisions in the Income Tax Acts establish that where a sum, even if described as interest, is awarded as damages or as a payment in the nature of damages, it is not interest of money within sch. D. Alternatively (*b*) the sum in question is non-recurrent and not capable of recurrence, and, for this reason, also, it is not interest of money within sch. D.

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(1) [1943] A. C. 607, 619.

The second point was apparently treated as subsidiary in the court below, and it will be convenient to deal with it first. It is based on a dictum of Lord Maugham in *Moss' Empires, Ld.* v. *Inland Revenue Commissioners* (1). This dictum is as follows: " In rule 21 'annual' must be taken to have, like " interest on money or an annuity, the quality of being " recurrent or being capable of recurrence." In that case Lord Maugham was dealing with annual payments and had not to direct his mind to the specific point of " interest of money "; but assuming that he did intend to lay down that a payment must have the essential characteristic of recurrence if it is to be interest of money within r. 21, I agree with Evershed J. that an award of interest under s. 3 of the 1934 Act possesses this characteristic. In making such award, the judge has to determine the amount of the debt on which interest is to be calculated, the rate at which it is to be calculated, and the period over which it is to run. In my view, such interest must be deemed to have accrued during the whole of the period so determined, notwithstanding that it only becomes payable in one sum by reason of the exercise by the judge of the discretion conferred on him by the section.

I turn to the first point. Mr. Grant argues that (1.) the quality of sums awarded under s. 3 of the 1934 Act is the same as the quality of sums awarded under ss. 28 and 29 of the Civil Procedure Act, 1833, which were repealed by sub-s. 2 of s. 3 of the Act of 1934, and (2.) interest awarded under s. 28 of the Act of 1833 has been held to be damages, or in the nature of damages, and, accordingly, interest awarded under the Act of 1934 has the same quality. Mr. Grant cited no authority in support of the first of these propositions, and, speaking for myself, I feel considerable doubt whether we should be justified in placing an artificial meaning on the word " interest " in the Act of 1934, because a similar artificial meaning was placed on the word " interest " in s. 28 of the Act of 1833, but I will assume in his favour that the word " interest " bears the same meaning in both Acts. Sections 28 and 29 of the Civil Procedure Act, 1833, are in the following terms, so far as relevant: Section 28: " And be it further enacted that upon " all debts or sums certain, payable at a certain time or other- " wise, the jury on the trial of any issue . . . . may, if they

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(1) [1937] A. C. 785, 795.

"shall think fit, allow interest to the creditor at a rate not "exceeding the current rate of interest from the time when "such debts or sums certain were payable, if such debts or "sums be payable by virtue of some written instrument at "a certain time, or if payable otherwise, then from the time "when demand of payment shall have been made in writing, "so as such demand shall give notice to the debtor that "interest will be claimed from the date of such demand until "the term of payment: provided that interest shall be "payable in all cases in which it is now payable by law." Section 29: "And be it further enacted that the jury on the "trial of any issue, or of any inquisition of damages, may, if "they shall think fit, give damages in the nature of interest, "over and above the value of the goods at the time of the "conversion or seizure, in all actions of trover or trespass de "bonis asportatis, and over and above the money recoverable "in all actions on policies of assurance made after the passing "of this Act." Mr. Grant says that "interest" in s. 28 must mean interest in the nature of damages. He says that interest in the ordinary sense is only payable under contract or by custom, and cannot be given merely for the wrongful detention of money. (See per Lord Herschell L.C. in *London, Chatham & Dover Ry. Co.* v. *South-Eastern Ry. Co.* (1)). Accordingly, when s. 28 purports to authorize a jury to award interest, it is really allowing them to award damages under the guise of interest. This argument seems to ignore the contrast between the language of s. 28 and that of s. 29, but Mr. Grant says that its correctness is established by the decision of the House of Lords in *Cook* v. *Fowler* (2) and of this court in *Webster* v. *British Empire Mutual Life Assurance Co.* (3). The former case had, as Evershed J. pointed out, nothing to do with s. 28 of the Civil Procedure Act, 1833, and I agree with him that the noble Lords in that case were stating a general principle in regard to interest not limited to the application of the Civil Procedure Act, that they were explaining that the principle on which courts of equity allow interest in cases where it would not have been allowed at common law, is compensation, but that they were not purporting to alter the quality of interest so awarded or to distinguish, so far as relevant to the present inquiry, interest so awarded, as, for example, in the case of a mortgage silent as to interest after the redemption date, from the interest in terms stipulated in a contract, for example, stipulated interest up to the redemption date in a mortgage. I also find myself in complete agreement with Evershed J.'s two final observations when dealing with this case, (1.) that the element of "wrong doing" in the debtor is prima facie irrelevant to the question of the quality of the sum awarded for interest, though it may well be relevant to the question whether, in equity, the claimant is entitled to any "interest" or "compensation," and (2.) that s. 28 of the Civil Procedure Act, 1833, introduced no new principle affecting the quality of "interest" awarded in respect of money claims, though it enlarged the class of cases in which it was competent for a jury to award interest.

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(1) [1893] A. C. 429, 437.
(2) L. R. 7 H. L. 27.
(3) 15 Ch. D. 169.

In *Webster* v. *British Mutual Life Assurance Co.* (1), s. 28 of the Civil Procedure Act, 1833, was relevant to the point at issue, and there are passages in the learned judges' judgments which at first sight appear to support the argument put forward by Mr. Grant, in particular the passage in the judgment of Cotton L.J. (2), where he says: "The question we have to "consider is whether interest has been properly given as "against the defendants. The instrument sued upon was "a policy of assurance. It contained no stipulation whatever "that the company should, under any circumstances, pay "interest. Interest, therefore, is no part of the debt or of the "sum stipulated by the contract to be paid. If it can be "recovered, it must be in the nature of damages. I say so "because, whether it comes under s. 29, where it is clearly to "be granted, if granted at all, in the nature of damages, or "under s. 28, where the language is different, in both cases it "comes as damages and is referable to the principles upon "which damages can be given. In the case of a policy of "assurance subsequently to the Act, as much as in a case "before the Act as regards other instruments, where no "stipulation appears for payment of interest but where it was "left to the jury that they might grant interest or not as they "thought fit, they would grant it by way of damages." I think, however, that these observations were directed merely to showing the principle on which interest is awarded in such cases, and that their Lordships' minds were not directed to the quality of the interest in the hands of the recipient. They were concerned to show that the underlying principle on which the jury were to award interest under s. 28, or damages in the nature of interest under s. 29, was in each case compensation, but I do not think they were holding that, although s. 28 authorized the award of interest, what the jury awarded under that section was in fact damages. I think the true contrast is between an award of interest by way of compensation for the detention of a sum of money and an award of damages, the damages being ascertained as a matter of convenience by an interest calculation.

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(1) 15 Ch. D. 169.

(2) Ibid. 175.

This distinction is a fine one, but it is recognized in the Tax Cases to which Mr. Grant called our attention. On the one side of the line fall *Schulze* v. *Bensted* (1), *Sweet* v. *Macdiarmid* (2), and *Inland Revenue Commissioners* v. *Barnato* (3). In *Schulze* v. *Bensted* (1) the income on which tax was claimed was interest at the rate of three and a-half per cent. on a sum which a negligent trustee had failed to get in to the trust. In *Sweet* v. *Macdiarmid* (2) it was interest on balances of jus relictæ recovered by the respondent from the trustees of her deceased husband's estate; in *Inland Revenue Commissioners* v. *Barnato* (3) it was compound interest recovered by the defendant from two gentlemen who had been trustees of two wills under which he was interested, and who had for a short time been partners with him in business; the interest being recovered as the result of an order of the court. In all these cases it was held that the interest was taxable income. On the other side of the line fell *Inland Revenue Commissioners* v. *Ballantine* (4) and *Simpson* v. *Executors of Bonner Maurice* (5). In *Inland Revenue Commissioners* v. *Ballantine* (4), a firm of contractors claimed "additional costs and damage" against a railway company, and the arbitrators to whom the claim was referred awarded a certain sum mainly as damages together with interest thereon at five per cent. The Revenue claimed tax on the amount of such interest, but the Court of Session rejected the claim. Their reasons are conveniently summarized in a sentence from the judgment of the Lord President where he says: "If the decree was substantially one of damages, the "interest ordered to run on it was just part of the damages "and not therefore chargeable to tax." In *Simpson* v. *Executors of Bonner Maurice* (5) the alleged income on which tax was claimed was compensation under Article 297 (*e*) of the

(1) 7 Tax Cas. 30.
(2) 7 Tax Cas. 640.
(3) 20 Tax Cas. 455.
(4) 8 Tax Cas. 595.
(5) 14 Tax Cas. 580.

Treaty of Versailles, which provided for compensation being paid to nationals of the Allied and Associated Powers in respect of damage or injury inflicted on their property, rights or interests. This compensation was awarded by the Mixed Arbitral Tribunal on the basis of interest at five per cent. on certain sums specified in the award. Rowlatt J. rejected the claim for tax, and his decision was affirmed by the Court of Appeal. The reasons for the decision sufficiently appear from a passage from the judgment of Lawrence L.J. (1) where he says: "Article 297 of the Treaty says nothing about the "payment of interest, and the money paid under the direction "of the Mixed Arbitral Tribunal was paid as compensation "and not as interest."

On which side of the line does the present case fall? In my opinion it is governed by the principle on which *Schulze* v. *Bensted* (2) was decided. In that case, to quote the language of Lord Johnston: "In these circumstances there was restored "to the trust a principal sum which ought throughout to have "been in the trustees' hands and bearing interest, and there "was also restored to the trust a sum representing that interest "at the rate of three and a-half per cent. But this latter sum "was so restored as at November, 1911, in one sum without "reference to its accrual termly between 1902 and 1911 at "a modified rate assumed to be the average return on the trust "investments and without compound interest. When it "reached the hands of the trustees it was a surrogatum for "that which ought to have termly reached the hands of the "trustees and have been applied by them as income, in which "case it would have been subject to income tax, and when it "did reach their hands I think they were equally bound to "apply it in accounting with the beneficiaries as income, and "I am unable to see any sound reason for holding that it did "not become liable to income tax in the hands of the trustees "when received." So here the principal sum of 36,255*l.*, being the amount due to Mr. Riches on taking the account of profits, ought to have reached his hands by June 14, 1936, and he could have invested it at interest. Oliver J. in his discretion awarded interest thereon at the rate of four per cent., and it may, I think, be taken that such rate of interest represents his estimate of the return which the principal sum would have earned had it been duly paid. Had the principal sum in fact been paid and earned interest, that interest would have been subject to income tax and, like Lord Johnston, I can see no sound reason for holding that the substituted sum awarded by Oliver J. is not equally liable to tax. Mr. Grant suggested that the distinction is that in *Schulze* v. *Bensted* (1) there was no element of wrongdoing, whereas in the present case there was an element of fraud. As I have already said, I agree with Evershed J. that the element of wrongdoing is irrelevant, but, in fact, I think it is clear from the report of the case in which the interest was recovered (*Lees Trustees* v. *Dun* (2)) that the basis on which interest was awarded was that the late Mr. Dun had been negligent in the discharge of his duty as trustee.

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(1) 14 Tax Cas. 605.

(2) 7 Tax Cas. 30.

For these reasons, I find myself in complete agreement with the conclusion reached by Evershed J. But Mr. Grant says we cannot reach this conclusion without disregarding the decision of Wright J. in *In re National Bank of Wales* (3). That was a case of misfeasance, it being alleged that the respondent had been party to the payment of dividends out of capital. The learned judge found against the respondent and awarded a principal sum with what the learned judge called " penal " interest " at five per cent. The respondent claimed that income tax should be deducted from the interest mentioned in the judgment, but the learned judge, notwithstanding orders in certain cases where interest had been directed to be deducted, rejected the claim. His decision on the question of misfeasance was reversed on appeal by this court and the reversal was upheld by the House of Lords, but the point relevant to the present case was not discussed in the higher courts. I find myself unable to agree with the conclusion reached by Wright J., unless it can be explained on the ground suggested by Lord Wright M.R. in *Inland Revenue Commissioners* v. *Barnato* (4), that Wright J. was awarding damages for fraud and merely using interest as a convenient method of calculating the damages.

In conclusion I should say a word about a point raised by the court in the course of the hearing. It was suggested that, whatever be the rights of the Crown against Mr. Riches, the bank was not entitled to deduct tax, since any right to interest had merged in the judgment, and the bank was not paying interest but merely satisfying a judgment for the lump sum of 46,283*l*. Counsel on both sides were agreed that this point was not well founded and I think Mr. Donovan was correct when he said that, although Mr. Riches' only remedy after judgment was to enforce the judgment, the quality of the elements making up that judgment was not changed, and that, at any rate, for the purpose of determining whether income tax was chargeable on the payee or was deductible by the payer, interest retained its original quality. The opposite conclusion might well deprive the Crown, who are not parties to the litigation, of a vested interest. It is true that if the judgment had not been satisfied the duty of the sheriff would have been to levy execution for the full amount of the judgment, but the only result would have been that r. 21 would never have come into operation, and the Crown would still have been able to claim tax from Mr. Riches. The principal sum, and interest less tax, having been paid, the judgment is, in my opinion, satisfied, since Mr. Riches is bound to acquit the bank of the amount deducted: see *Allchin* v. *Coulthard* (1).

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(1) 7 Tax Cas. 30.
(2) 1912 S. C. 56.
(3) (1899) 2 Ch. 629.
(4) 20 Tax Cas. 455, 509, 510.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Last, Riches & Co.; Kenneth Brown, Baker, Baker.*

H. C. G.

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(1) [1943] A. C. 607.

COHEN J.

1945

Apr. 16, 23.

In re S. DAVIS AND COMPANY, LIMITED.

Bailment—Deposit of furniture by bailor—Voluntary liquidation of storage company—Bailor not notified—Enemy action—Damage to and loss of furniture—Sale of company business by liquidator—No notice to bailor—Action for damages by bailor—Judgment—Summons for order on liquidator for payment—Priority—Onus of proof.

The applicant stored his furniture with a company which, eight months later, in May, 1940, went into voluntary liquidation without giving notice to him. The storage premises were thrice damaged by enemy action, namely, in September, October and November, 1940. In November, 1941, the liquidator sold the company's business and, in February, 1942, the purchaser transferred it to another company, on each occasion without notice to the applicant. On March 29, 1943, the applicant removed his furniture and found that some articles were missing and some damaged. He therefore sued both companies for damage and negligence. On the first company's defence being struck out, he discontinued the action against the

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second company, signed judgment against the first company for the amount of the damage, and, in December, 1944, issued a summons for an order that the liquidator pay him the amount of the judgment and taxed costs in priority to the company's general debts and liabilities, and in full before payment of any dividend to its pre-liquidation creditors. The evidence of the liquidator was that he could not ascertain whether the loss or damage occurred before, during or after the time when he was carrying on the business, and the registrar held that the onus of proof that it took place after the commencement of the liquidation was on the applicant and that he had not discharged it. He therefore dismissed the summons:—

Held, that the furniture was not delivered up in proper condition on the due date, which was after the commencement of the liquidation; that the applicant had proved that the liquidator had adopted the contract; and that, even if the onus was at first on the applicant to establish his right to priority, ultimately it was on the liquidator to excuse the breach of contract, and he had failed to do so.

Phipps v. *New Claridge's Hotel, Ld.* (1905) 22 T. L. R. 49, and *Coldman* v. *Hill* [1919] 1 K. B. 443, followed.

MOTION.

In September, 1939, the applicant deposited furniture for storage with the company (hereinafter called "the first company") which, in May, 1940, went into voluntary liquidation, of which notice was not given to the applicant. On September 19 and 20, October 21, and November 16 and 17, 1940, the premises where the furniture was stored were damaged by enemy action. On November 25, 1941, the liquidator sold the first company's business to a purchaser who, in February, 1942, transferred it to a second company, the applicant not being given notice of either the sale or the transfer. The applicant paid storage charges to the first company up to and including October 9, 1942. On or about March 29, 1943, he removed the furniture, and found that some articles were missing, some damaged. On June 16, 1943, he began an action against both companies for damages for breach of contract and negligence. On November 10, 1944, the first company's defence was struck out. The applicant thereupon discontinued his action against the second company. On November 23, 1944, he signed judgment against the first company for 601*l.* 15*s.* 6*d.*, and on December 4, 1944, issued a summons for an order on the liquidator to pay him the amount of the judgment and taxed costs in priority to the first company's general debts and liabilities and in full before payment of any dividend to its pre-liquidation creditors. The liquidator in evidence stated that he could not ascertain whether the loss and damage took place before, during or after the time when he was conducting the business with a view to its sale as a going concern, and the applicant, in an affidavit made about twenty-two months after he had removed the furniture, stated that he believed that the loss and damage took place while the liquidator was carrying on the business. The registrar dismissed the summons, stating that the question was whether the loss and damage had taken place before or after the commencement of the liquidation, and holding that the onus of proof that it had taken place after the commencement of the liquidation was on the applicant, and he had failed to discharge it.

Wynn Parry K.C. and *Morle* for the applicant. The applicant is entitled to payment in respect of the damage and loss. The registrar has erred in his application of the law. The contract with the first company is one of bailment for reward, and the relevant date, namely, that on which the bailment ended, was March 29, 1943, the date on which the applicant received back his furniture. It is immaterial that it had by that date been handed over to the second company: see Halsbury's Laws of England, 2nd ed., vol. I., p. 724, where a bailment is defined as " a delivery of personal chattels in trust, " on a contract . . . . that the trust shall be duly executed, " and the chattels redelivered in either their original or an " altered form, as soon as the time or use for, or condition on " which they were bailed shall have elapsed or been " performed." In the present case the only contract is that which came into being on or about September 3, 1939. That contract the liquidator took over for purposes of the beneficial winding-up of the first company and, as he did not give notice to the applicant before transferring the business, he cannot set up a new contract. At the latest the contract determined when the applicant asked for his goods back. Only then did the bailee's liability arise. That position is to be contrasted with one where a company is a lessee. A lessee's liability for rent accrues de die in diem, and the line between pre-liquidation and post-liquidation liability is easily drawn. In the present case, it is no answer for the bailee to say : " I have " not the goods " : *Phipps* v. *New Claridge's Hotel, Ld.* (1) ; *Coldman* v. *Hill* (2). By the liquidator transferring the business

(1) (1905) 22 T. L. R. 49.

(2) [1919] 1 K. B. 443.

the applicant was deprived of any opportunity of safeguarding himself, and he therefore correctly alleges that the bailment ended while the liquidator was still carrying on the business for the purposes of the beneficial winding-up of the first company.

J. Wolfe for the liquidator. The first company undertook a contract of bailment, which continued while the first company was in liquidation. The contract was then taken over and continued until the bailor asked for his furniture back. The actual breach, namely, failure to deliver up in proper condition, did not occur while the liquidator was carrying out the contract. Judgment was recovered against the company in liquidation and therefore a debt against the company arose. Prima facie, all debts of a company in liquidation are to be matters of proof or, alternatively, of payment after a dividend, and only in a very special class of case can payment be had on the footing that such a debt was incurred while the business was being carried on for the purposes of liquidation. The applicant has chosen not to prove in the winding-up, but to recover judgment. He seeks the special privilege of priority, and, to establish his right to that privilege, must show that the negligence which led to the breach of contract took place after the commencement of the liquidation. That he has entirely failed to do.

Cur. adv. vult.

Apr. 23. COHEN J. read a judgment in which he stated the facts and continued: Mr. Wynn Parry, for the applicant, argued that the registrar had misdirected himself as to where the onus of proof lay. He referred to the definition of "bailment" in Halsbury's Laws of England, 2nd ed., vol. I., p. 724. That definition, which is taken from Bacon's Abridgment, is in these terms: "A bailment, properly so called, is a "delivery of personal chattels in trust, on a contract, express "or implied, that the trust shall be duly executed, and the "chattels redelivered in either their original or an altered "form, as soon as the time or use for, or condition on which "they were bailed, shall have elapsed or been performed." I pause here to say that the words "or an altered form" have no bearing on the present case. That being the contract, the material date, says Mr. Parry, is the date on which there was a breach of the obligation to re-deliver the goods; that is, on the facts of this case, March 29, 1943. It is not disputed that the applicant's goods were, as to part thereof, not redelivered at all, and, as to a further part, delivered in a damaged condition. The contract had been adopted by the liquidator and, in those circumstances, Mr. Parry says, the onus is on the liquidator to show that the loss or damage did not occur after the commencement of the liquidation. He relied on the decisions in *Phipps* v. *New Claridge's Hotel* (1) and *Coldman* v. *Hill* (2). In both those cases the bailed property (in the former case a dog and in the latter case cattle) had been lost, and the question arose whether the onus was on the bailor to prove negligence or on the bailee to show that they had not been lost through his negligence. In both cases it was held that the onus was on the bailee. The principle on which these cases were decided appears sufficiently from a passage in the judgment of Scrutton L.J. in the latter case where, referring to an unreported case in the House of Lords (*Morison* v. *Walton* (3)), he said (4): " In that " case the defendant was bailee of a boat which he undertook " to tow across the Atlantic with a term in the contract that he " should have a man on board. He broke his contract, and " had no man on board. The boat was lost at night, and there " was no evidence whether she was lost by gradual straining " and leakage, or by a sudden and overwhelming wave. There " was therefore no evidence whether the man, if on board, " would have detected the leak and ordered the towing vessel " to slacken speed, or whether he would have been destroyed " by the overwhelming wave without being able to do anything. " The House of Lords held that the man who had, by breaking " his contract, destroyed the possibility of any evidence on the " subject, could not be heard to say that there was no evidence " that his breach of contract caused the loss. It was his duty " as bailee to prove that his breach of duty did not cause the " loss, not the plaintiff's duty to show that it did. This " appears to be merely an application of the principle omnia " præsumuntur contra spoliatorem, under which a man " who, having converted property, refuses to produce it that " its exact value may be known, is liable for the greatest value " that such an article could have . . . ."

In neither of these cases was the question of the exact time of the loss material, but I think that the principle there laid down applies. The liquidator carried on the business of the first company, including the business of holding the applicant's

(1) 22 T. L. R. 49.
(2) [1919] 1 K. B. 443.
(3) Unreported, May 10, 1909.
(4) [1919] 1 K. B. 443, 457, 458.

goods in bailment for reward. All debts and liabilities incurred in the course of carrying on the business by the liquidator, being in the nature of salvage, rank for payment in priority to the general debts and liabilities of the first company. (See Palmer's Company Precedents, 15th ed., vol. ii., p. 794.) Among such liabilities was the obligation to deliver up the goods to the applicant in proper condition at the termination of the bailment. The goods were not delivered up at the due date in proper condition, the due date was after the commencement of the liquidation, and, in my opinion, had the applicant made application in the winding-up for damages for breaches of this obligation, instead of commencing proceedings in the King's Bench Division, he would, on the authority of the cases to which I have referred, have been entitled to payment in full of the amount of such damages, unless the liquidator established either (*a*) that the loss or damage was not due to negligence—e.g., that it was due solely to war damage—or (*b*) that it was due to an event occurring before the commencement of the liquidation. This he has not sought to do, for reasons which appear from his affidavit.

Mr. Wolfe, who appeared for the liquidator, admitted that where a bailee failed to deliver up goods in proper condition at the determination of the bailment, the onus was on him to justify failure to do so, but he argued that as the applicant had chosen to recover judgment he was in the position of an ordinary judgment creditor and could not claim priority over the general debts and liabilities of the company, unless he established facts entitling him to such priority. The short answer to this argument is, I think, that the applicant has proved that the contract was adopted by the liquidator and that in breach of the contract, when the due date for redelivery (which was after the commencement of the winding-up) arrived some goods were not delivered at all and others were damaged. These facts being established, if the onus rested originally on the applicant, it was, in my opinion, shifted to the liquidator to excuse such breach, and this onus he has failed to discharge.

Mr. Wolfe also somewhat faintly suggested that the position was altered by the delivery of the goods to the purchaser from the liquidator and by their delivery by that purchaser to the second company, but I do not think this can avail him unless he can establish novation; that is, that the applicant agreed to look for the fulfilment of the contract to either the purchaser from the liquidator or the second company, instead of to the first company. The onus of establishing novation is clearly on the liquidator, and this he has not discharged or, indeed, attempted to discharge. In these circumstances the appeal succeeds and I must make the declaration asked for on the summons. The liquidator will pay out of the company's assets the applicant's taxed costs of the application, both in this court and before the registrar, and the liquidator's costs, including what he will so pay to the applicant, will be costs in the winding-up.

Solicitors: *Batchelor, Pirkis & Fry; Hyman Isaacs, Lewis & Mills.*

K. R. A. H.

C. A.
1945
July 16, 17, 18, 19, 30.
Lord Greene M.R., du Parcq and Morton L.JJ.

In re SAMUEL. [No. 2.]

Bankruptcy—After-acquired property—Receipt of property of bankrupt by solicitor as agent—Delivery up to bankrupt's servant by solicitor knowing of intended sale—Title of trustee in bankruptcy to property—Conversion—Ministerial Act—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 38, 47.

A solicitor on the instruction of his client whom he knew to be an undischarged bankrupt took delivery as her agent of a gift to her of jewellery and subsequently by her direction handed the jewellery to her old servant who, she stated, was to sell it and apply the proceeds for the education of the bankrupt's son. In fact the old servant did not sell it but handed it to the bankrupt who sold it but did not apply the proceeds for her son's education. The trustee in bankruptcy having discovered what had happened brought proceedings against the solicitor asking for a declaration that he had been guilty of conversion and claiming the jewellery or its value:—

Held (affirming Evershed J.), that the solicitor had merely done the ministerial act of transferring the jewellery which he held as an agent of the bankrupt to another agent, and that even though he knew of the intended sale by the other agent and application of the proceeds for the education of the bankrupt's son (neither of which took place), he had not been guilty of conversion. He had acted on the instructions of the principal on whose behalf he had received the jewellery and who had a right to its possession against all the world but the trustee and could confer a good title to the goods on sale under s. 47 of the Bankruptcy Act, 1914.

APPEAL from Evershed J.

In October, 1941, Mrs. Samuel transferred to her husband the property in jewellery which she had deposited with him as security for indebtedness, and which was held for him by a bank. In July, 1943, she was adjudicated bankrupt and a trustee in the bankruptcy was appointed. On November 2, 1943, the husband by letter authorized his solicitors, Messrs. Ridsdale & Son, to release the jewellery to her when his divorce decree was made absolute and, on November 17, 1943, the husband's solicitors wrote to the bankrupt's solicitors, Messrs. Forsyte, Kerman & Phillips, quoting that letter and suggesting that the bankrupt's solicitors should obtain her authority for the jewellery to be handed to them, which they did. On November 22, 1943, on which date the decree absolute was pronounced, the bankrupt by letter authorized Mr. Kerman, who was a member of her firm of solicitors, to hand the jewellery to Mrs. Maple, an old servant of hers, who, she stated, would be disposing of it on her behalf for her son's education. On November 26, 1943, an employee of the bank, at the husband's solicitors' office, handed the jewellery to Mr. Kerman as agent of the bankrupt. The trustee in bankruptcy did not at the time know that this had been done. At the office of the bankrupt's solicitors, Mr. Kerman gave the jewellery to Mrs. Maple, who handed it back to him and asked him to put it in safe custody for her, which he did. At later dates in December, 1943, at his office, in the presence of the bankrupt, and on her instructions, Mr. Kerman returned the jewellery to Mrs. Maple. Neither the bankrupt nor Mrs. Maple told Mr. Kerman that they were taking the jewellery to sell it at once but he knew that the bankrupt intended to sell it. The jewellery was in fact handed by Mrs. Maple to the bankrupt who sold it but did not apply the proceeds for her son's education. There was correspondence between the bank and the trustee, the bank and the trustee's solicitors, and the trustee and the purchaser of some of the jewellery from the bankrupt, and, on January 22, 1945, the bankrupt's solicitors wrote to the trustee enclosing the receipts which they had originally taken for the jewellery. On February 22, 1945, the trustee's solicitors wrote asking Mr. Kerman to deliver up the jewellery, as it was after-acquired property of the bankrupt, or to pay its value. Mr. Kerman did neither of those things and the trustee took out a motion asking, inter alia, for (I.) a declaration that Mr. Kerman, after the bankruptcy, converted the jewellery to his own use or to that of the bankrupt's servant; (2.) an order that the matter be referred to the registrar to take an account of the value of the jewellery; and (3.) an order that Mr. Kerman return the jewellery to the trustee or pay him its value as so ascertained.

Evershed J. held that there had been no conversion by Mr. Kerman; and that it was not the duty of a solicitor to withhold from his client possession of property to which the solicitor had no claim, even if the client, being an undischarged bankrupt, had expressed an intention so to deal with the property as probably to contravene the Bankruptcy Act, 1914, or if the solicitor was not satisfied that the client would deal with it strictly in accordance with that Act. The trustee appealed.

Slade K.C. and *Aronson* for the trustee in bankruptcy. Mr. Kerman was guilty of conversion in that he, as the bankrupt's solicitor, complied with her instructions knowing that she had no authority to give them. The Bankruptcy Act, 1914, s. 38, provides that all property acquired by or devolving on an undischarged bankrupt is divisible among his creditors. Section 22, sub-s. 4, makes it contempt of court for a bankrupt to fail to deliver up possession of any part of his property, divisible among his creditors, to the trustee. Section 47, sub-s. 1, provides that all transactions by a bankrupt with any person bona fide and for value in respect of after-acquired property are valid against the trustee if completed before he intervenes. Section 48, sub-s. 6, provides that any attorney or agent of a bankrupt is to pay and to deliver to the trustee everything in his hands on behalf of the bankrupt that he is not entitled to retain against the trustee, subject to the provisions of the Act with respect to after-acquired property. Lastly, s. 154, sub-s. 1, provides that a bankrupt is guilty of a misdemeanor for failing to disclose to the trustee all his property and how and to whom and for what consideration he disposed of any part of it. This was held to apply to after-acquired property: *R.* v. *Michell* (1). *In re Pascoe* (2) established that the trustee in bankruptcy had a right to the after-acquired property of the bankrupt before he intervened and that the trustee's title is only qualified by the rights given to the bankrupt by s. 47, sub-s. 1, to sell to third parties so long as the trustee has not intervened. It follows that any dealing with the property by an agent otherwise than as a mere conduit pipe is conversion. Here, Mr. Kerman was

(1) (1881) 50 L. J. (M. C.) 76.

(2) [1944] Ch. 219.

guilty of conversion because (1.) the bankrupt had no authority to direct him to deliver the property ; (2.) she was not directing its delivery to her old maid as a conduit pipe, but for its sale to provide for the education of her son, which was quite inconsistent with the handing over of the property to the trustee. "The wrong of conversion consists in an act of "wilful interference with a chattel, done without lawful "justification": Salmond on Torts (9th ed.), p. 302 ; and that applies (p. 305) to an agent acting on behalf of his principal : *Stephens* v. *Elwall* (1) and *Hollins* v. *Fowler* (2) where Blackburn J. in his advice to the House of Lords gives examples of cases in which the tortfeasor was an agent. Further, Salmond on Torts (9th ed.), p. 323, deals with delivery to a third person so as to affect the title. In that case the agent must, in order to be guilty of conversion, have actual knowledge that his delivery of the goods was part of a transaction affecting the title. Here Mr. Kerman knew of the trustee in bankruptcy's right to the property and his liability arises from his making a delivery so as to effect a change of title with this knowledge.

[MORTON L.J. Was Mr. Kerman doing more than handing over the property to another agent of the bankrupt ?]

He was doing it with knowledge of the true ownership of the property and with knowledge of the intent to sell it and apply the proceeds for the benefit of the bankrupt's son. It was that knowledge which made his act conversion.

[LORD GREENE M.R. The transaction affecting title would have been the sale of the property by the bankrupt's servant, but in fact she did not sell it : He referred to Pollock on Torts (7th ed.), p. 67.]

Anyone taking part in a transaction resulting in a tort is liable as a joint tortfeasor. Mr. Kerman knew of the risk of a sale.

[LORD GREENE M.R. To involve a conversion the act, looked at in isolation, must have the effect of depriving the true owner of his property. Can it be said that the act of handing the jewellery to the bankrupt deprives the trustee of his property ?]

It is the intention that is vital. (They referred to Halsbury's Laws of England (2nd ed.), vol. 33, pp. 53–4, ss. 84, 89.)

[DU PARCQ L.J. The difficulty arises because the bankrupt is entitled to possession of the jewellery but not to the property in it.]

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(1) (1815) 4 M. & S. 259.

(2) (1875) L. R. 7 H. L. 757.

What makes the transaction tortious is the knowledge of Mr. Kerman that the act is a link in a chain which will ultimately deprive the trustee of his title. A tort was committed by him in handing over the jewellery and another tort was committed by the bankrupt in selling it. It is conceded that tort No. 1 must be shown to be a tort apart, even from defeasance of the true owner's title.

In *Powell* v. *Hoyland* (1), which is very near to the present case, the agent knew of the unlawful intention, but in *Winter* v. *Bancks* (2) a distinction was drawn between being a mere conduit pipe and taking a step in depriving the owner of his property.

In Winfield on Torts (1937 ed.), at p. 374, conversion is defined as " any act in relation to the goods of a person which " constitutes an unjustifiable denial of his title to them." (See also p. 379.) Here the handing over of the jewellery was a denial of the title of the trustee. [They cited *Hiort* v. *Bott* (3) and *Hollins* v. *Fowler* (4).] There are three possible varieties of act which may raise the question of conversion: (*a*) an act which obviously interferes with the owner's title—that is conversion; (*b*) an act which is colourless when there is no conversion; (*c*) an act which would be colourless but for knowledge that it is to form a step in the transfer of title. That is conversion, because the act is done with knowledge. Mr. Kerman cannot rely on any duty of bailee to bailor, because the bailee was aware that his bailor was herself a bailee for the true owner. In *McEntire* v. *Potter* (5), the agent handed over property to a person he believed to be his principal but the agency, though he did not know it, had been determined by the supervening bankruptcy of the principal. The bailee is acting purely ministerially only if he is doing something consistent with the special property of his own bailor, who is also a bailee, but if, as here, he knows that his act is inconsistent with that special property it is tortious.

[They cited *Underwood* v. *Bank of Liverpool* (6); *Cochrane* v. *Rymill* (7); *National Mercantile Bank* v. *Rymill* (8); *Consolidated Co.* v. *Curtis & Son* (9).]

(1) (1851) 6 Ex. 67.
(2) (1901) 84 L. T. 504.
(3) (1874) L. R. 9 Ex. 86.
(4) L. R. 7 H. L. 757.
(5) (1889) 22 Q. B. D. 438.
(6) [1924] 1 K. B. 775.
(7) (1879) 40 L. T. 744.
(8) (1881) 44 L. T. 767.
(9) [1892] 1 Q. B. 495.

Beyfus K.C. and *Gallop* for the respondent. The law of conversion is sufficiently difficult by itself and to combine the law of bankruptcy with it results in almost inextricable confusion. First, leaving the bankruptcy law out altogether, the action of Mr. Kerman did not constitute a conversion. Conversion may be either a wrongful taking or a wrongful detention (neither of which apply here) or it may be a wrongful disposition. Here there was no disposition. The jewellery was handed by one agent to another without affecting either the title to the property or the legal possession. There is no case in which conversion has been held to be established when the transfer merely passed the physical possession. [They referred to *Consolidated Co.* v. *Curtis & Son* (1) and *Hiort* v. *Bott* (2).] It is the wrongful act which constitutes conversion not mere intention: *Rogers* v. *Lambert* (3). For the appellant reliance was placed on *Stephens* v. *Elwall* (4), which is distinguishable. The jewellery was handed over here for a purpose not fulfilled. Secondly, having regard to the bankruptcy law, Mr. Kerman did not commit a conversion, or a tort of any kind. The whole idea (on which the trustee's case rests) that an undischarged bankrupt selling his property is committing a tort is completely erroneous. The trustee is bound to treat delivery of the jewellery to Mr. Kerman as delivery to the bankrupt. His whole case rests on the physical possession of Mr. Kerman's being the legal possession of the bankrupt. The proposition that a sale by an undischarged bankrupt of after-acquired property for value is a tort is contrary to the whole trend of the law and s. 154 of the Bankruptcy Act, 1914, makes the position clear. The words " wilfully refused to " deliver " imply a demand by the trustee. Unless and until the trustee demands the property, the bankrupt may buy or sell, provided the sale is legitimate and not a mere colourable disposition of his property. [They referred to *Cohen* v. *Mitchell* (5).] *McEntire* v. *Potter* (6) has no suggestion about after-acquired property.

[DU PARCQ L.J. If the bankrupt had said " I want my son " to have a good education and I am going to sell my jewellery " to pay for it," would she have been doing anything criminal or tortious ?]

No, but the trustee would have had a right to step in and

(1) [1892] 1 Q. B. 495, 500.
(2) L. R. 9 Ex. 86.
(3) [1891] 1 Q. B. 318.
(4) 4 M. & S. 259.
(5) (1890) 25 Q. B. D. 262.
(6) 22 Q. B. D. 438.

C. A.

1945

SAMUEL [No. 2], *In re.*

claim the jewellery or its proceeds. In so far as s. 47 protects transactions between the bankrupt and third parties the protection must extend to intermediaries. Bona fides is not excluded by knowledge. [They cited *Hunt* v. *Fripp* (1), *In re Bennett* (2) and *Dyster* v. *Randall & Sons* (3).]

Aronson in reply. The bankrupt committed a tort by disposing of the jewellery and Mr. Kerman was also guilty of a tort in that he knew what the bankrupt was going to do. Salmond on Torts (9th ed.), p. 323.

[DU PARCQ L.J. Even if the bankrupt changed her mind, there might be conversion although it was impossible to prove damages.]

Yes, there would be nominal damages in that case.

[LORD GREENE M.R. referred to *Biddle* v. *Bond* (4).]

The suggestion that the bankrupt had a right to sell after-acquired property is contrary to the established view. Under the Bankruptcy Act after-acquired property vested in the trustee. It is the duty of the bankrupt to deliver up after-acquired property without waiting for the trustee to ask for it. Section 154 extends to after-acquired property. There is nothing inconsistent in the Act protecting a bona fide purchaser of property from a bankrupt, although the bankrupt is guilty of a tortious act in selling.

Cur. adv. vult.

July 30. The judgment of the court was read by MORTON L.J.: In our view the decision of Evershed J. in this case was correct, and we can state our reasons quite shortly. The relevant facts are fully set out in the judgment of the learned judge and need not be repeated.

The only question before this court is—Was the tort of conversion committed by Mr. Kerman when he handed over the jewellery to Mrs. Maple on the afternoon of November 26, 1943? In considering this question it must be borne in mind that Mr. Kerman, when he received the jewellery from Messrs. Ridsdale & Son, received it on behalf of his principal, the bankrupt, and, as the learned judge points out, the intended gift by Major Samuel to the bankrupt became complete only when possession of the jewellery was delivered to Mr. Kerman. Then, and only then, the jewellery became "after-acquired "property" of the bankrupt, and immediately thereafter the jewellery became the property of the trustee in bankruptcy, under s. 38, para. (*a*), of the Bankruptcy Act, 1914. The bankrupt, however, was in possession of the property by her agent, Mr. Kerman, and that possession was not wrongful. Moreover, the bankrupt was in a position to confer a good title to the jewellery upon any person dealing with her bona fide and for value, under s. 47 of the Act. As was said in *In re Pascoe* (1): "The precise relationship of the bankrupt to his "after-acquired property has been described by various "analogies. He has been likened to a factor or some other agent "having authority to pass the title to the goods. He has "been likened to a trustee. None of these analogies are really "accurate and, of course, they cannot be pressed. He has "certain powers to confer a title to, and certain rights in respect "of, his after-acquired property. Thus, he has the right to "protect it against wrongdoers, but the title of the trustee is "only qualified by those rights given to the bankrupt by "s. 47, which protect transactions with third parties but do "not in any way qualify the title of the trustee, save in so "far as that title is liable to be impaired in cases which fall "under the section." When Mr. Kerman handed the jewellery to Mrs. Maple, in pursuance of the bankrupt's letter of November 22, 1943, he merely transferred the possession of it from one agent of the bankrupt to another agent of the bankrupt, and it is conceded by counsel for the trustee that if Mr. Kerman had simply been instructed to hand the jewellery to Mrs. Maple, his act in carrying out this instruction would not have been a conversion of the jewellery. It is said, however, that his act was a conversion because he knew that the bankrupt was an undischarged bankrupt, and knew (or must be deemed to have known) that the property in the jewellery was vested in the trustee, and, having received the letter of November 22, 1943, knew that Mrs. Maple would be disposing of the jewellery on behalf of the bankrupt for the education of the bankrupt's son Ian. There is no doubt that Mr. Kerman was well aware of the bankruptcy, and we are prepared to assume, in favour of the trustee, that he must be deemed to have known the true legal position, although the case of *In re Pascoe* (2) was not decided by the Divisional Court till December 13, 1943. Having this knowledge, he had before him an intimation that two transactions were contemplated, (1.) a sale of the jewellery by Mrs. Maple on behalf

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(1) [1898] 1 Ch. 675.

(2) [1907] 1 K. B. 149.

(3) [1926] Ch. 932.

(4) (1865) 6 B. & S. 225.

(1) [1944] Ch. 219, 225–226. (2) [1944] W. N. 27.

of the bankrupt ; (2.) an application of the proceeds of sale for the education of the bankrupt's infant son Ian. In our judgment this intimation did not have the effect of impressing the character of a conversion upon the transfer of the jewellery to Mrs. Maple. Apart from the fact that the jewellery was in fact sold by the bankrupt and not by Mrs. Maple, and that the proceeds of sale were not spent on Ian's education, it was reasonable for Mr. Kerman to suppose that any sale which might take place would be a sale to a bona fide purchaser for value ; there is in fact no evidence that any of the sales carried out by the bankrupt did not answer this description, and it is to be noted that a purchaser for value would get a good title even if he knew that his vendor was an undischarged bankrupt. Whatever might have been the position if Mr. Kerman's principal had had no right or interest in the goods, he was in fact acting on the instructions of a principal on whose behalf he had acquired the goods, who had a right to the possession of the goods against all the world except the trustee, and who could confer a good title to the goods on sale. All that he did was to transfer the goods, on the instructions of that principal, to another agent of that principal with a view to a sale. At no time, during the series of events which resulted in the sale of the jewellery, was any person in wrongful possession of the jewellery. It seems to us quite impossible to hold that Mr. Kerman, who merely did the one ministerial act already described, was thereby guilty of a conversion of the goods.

If this be the true view, the fact that Mr. Kerman was informed of the bankrupt's intention to use the proceeds of sale for the education of her son Ian can make no difference. The bankrupt merely expressed to Mr. Kerman an intention (which might, of course, be changed) to use the proceeds of sale in a particular way. Such a user might or might not have been a conversion of the proceeds by the bankrupt ; but we do not see how the intimation of this intention to Mr. Kerman can have the effect of making his act in handing over the jewellery a conversion of the jewellery, if it would not otherwise have been a conversion of the jewellery. It was submitted as one of the steps in the argument that if Mrs. Samuel had not been a bankrupt, but had merely been a person having, to the knowledge of Mr. Kerman, no title to the jewellery, Mr. Kerman, in handing the jewellery to Mrs. Maple as agent of Mrs. Samuel, his bailor, would have been guilty of conversion by reason of his knowledge that

Mrs. Samuel (through her agent Mrs. Maple) was intending to deal with the jewellery in a manner inconsistent with the rights of the true owner. It must not be taken from anything that we have said that we assent to this proposition. On the view that we take it is not necessary to express any opinion upon it. The appeal must be dismissed with costs.

We desire to add that we do not conceive it to be our duty to make any observations as to the propriety or impropriety of Mr. Kerman's conduct in acting on the bankrupt's instructions, and we have formed no view on this matter.

Appeal dismissed.

Solicitors: *Spector & Spector; Forsyte, Kerman & Phillips.*

H. C. G.

In re HEATH, DECEASED.

STACEY AND ANOTHER *v.* BIRD AND ANOTHER.

COHEN J.
1945
June 28, 29; *July* 11.

Legitimacy—Spouses living apart—Death of husband—Wife cohabiting with subsequent second husband—Birth of child to wife eight months after death of husband—Subsequent second husband registered as father—Marriage of wife to subsequent second husband—Evidence of non-access of first husband—Admissibility—Presumption of legitimacy as child of first husband—Rebuttal of presumption—Legitimation by marriage to second husband—Legitimacy Act, 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1, *sub-ss.* 1, 2.

The Legitimacy Act, 1926, by s. 1, sub-s. 1, provides that: "Subject to the provisions of this section, where the parents of an illegitimate person marry . . . . one another . . . . the marriage "shall, if the father of the illegitimate person . . . . is at the date "of the marriage domiciled in England or Wales, render that "person . . . . legitimate . . . ." By sub-s. 2: "Nothing in this "Act shall operate to legitimate a person whose father or mother "was married to a third person when the illegitimate person was "born."

In May, 1919, R. was ill and went into hospital. He was on bad terms with his wife and never went back to his home. From August, 1919, Mrs. R. cohabited with B. R. lived in a hotel in October and in lodgings in November, and died in hospital on December 18, 1919. On August 20, 1920, Mrs. R. gave birth to a daughter whose birth was registered on October 4, 1920, B. being registered as the father. On June 9, 1923, B. married Mrs. R., and on December 30, 1927, the daughter's birth was re-registered with the authority of the Registrar-General, B. again being named as the father. On June 8, 1938, B. died, and by his will left all his estate to the daughter, to whom he therein referred as his daughter by name. On July 13, 1943, a sister of B., under whose will he was entitled to half her residue (another sister, already predeceased, being entitled to the other half), died without leaving parent, issue, brother or sister surviving, and the daughter, if she was B.'s legitimate daughter by virtue of the Act, was entitled to the estate on intestacy:—

Held, that the presumption of law that the daughter, having been born within the normal period of gestation after the death of R., was R.'s legitimate offspring, was rebutted by the evidence from which it could reasonably be inferred that B. was the father; that the words "was born" in sub-s. 2 were to be construed strictly as meaning "came into a separate existence" and not as meaning "was conceived," and that therefore sub-s. 2 did not apply and the daughter, being legitimated by sub-s. 1, was absolutely entitled to the estate on the intestacy of the testatrix.

Villar v. ***Gilbey*** [1907] A. C. 139, followed.

ADJOURNED SUMMONS.

In May, 1919, George Roberts was in very bad health and, on August 22, was taken to hospital from his house, which he never again entered. From August, 1919, his wife, Mildred Roberts, lived and cohabited with Alfred Harold Brookman, and was known as his wife. In October, Mr. Roberts lived in a hotel and in November in lodgings and on December 18, 1919, he died in hospital. There was animosity between him and Mrs. Roberts. On August 20, 1920, Mrs. Roberts gave birth to a daughter, who was the first defendant to this summons. On October 4, 1920, the first defendant's birth was registered, she being described as the daughter of Brookman and of "Mildred Roberts, formerly Newton." On June 9, 1923, Brookman married Mrs. Roberts. On December 30, 1927, the first defendant's birth was re-registered on the registrar-general's authority, Brookman again being described as the father, and the mother being described as "Mildred Brookman, "late Roberts, formerly Newton." By her will dated July 8, 1936, a testatrix, Mrs. Edith Mary Heath, who was a sister of Brookman, gave her residuary estate on trust as to one half for another sister and as to the other half for Brookman. On December 6, 1937, the other sister died without leaving issue surviving. On June 8, 1938, Brookman died, having by his will left all his estate absolutely to the first defendant, to whom he therein referred by name as his daughter. On July 13, 1943, the testatrix died, leaving no parent, issue, brother or sister surviving. By this summons, which was taken out on February 7, 1944, the testatrix's executors asked, inter alia, that an inquiry be directed to ascertain who, on the testatrix's death, became entitled to any property as to which she died intestate. On the evidence, the first defendant was so entitled if she was Brookman's legitimate daughter by virtue of the Legitimacy Act, 1926. The summons was therefore adjourned into court to decide the question of legitimacy. The evidence included a statement by a son of Mr. Roberts by a previous marriage that Mr. Roberts had called at his home and had told him that he was no longer living with Mrs. Roberts but was living in Brockley and had before that been living in a lodging house in Kennington. It included also a statement by a friend of Mr. Roberts that Mr. Roberts had told him that when he was discharged from hospital Mrs. Roberts had refused to admit him to his home and would have nothing whatever to do with him, and that he would make no further attempt to see her. There was also evidence by a daughter of Mr. and Mrs. Roberts that Mr. Roberts had left the house in August, 1919, and her parents had never after that lived together as husband and wife.

Fawell for the executors.

Stranders for the first defendant. On the evidence, the first defendant is Mr. Brookman's legitimate daughter by virtue of s. 1, sub-s. 1, of the Legitimacy Act, 1926. There cannot be any presumption of sexual intercourse at the relevant time between Mr. and Mrs. Roberts. [He referred to *The Aylesford Peerage* case (1) and *Morris* v. *Davies* (2).] There does not appear to have been reported any case in which a child born three hundred and sixty-three days after the latest time at which the husband could have had intercourse was held to be the husband's child. The first defendant's birth was re-registered with the registrar-general's authority and the court will not disregard his reasons for giving that authority, although it is not bound by them. Entries in birth certificates are prima facie evidence of the truth of what they state: *In re Stollery* (3), and one of the duties of a public officer is to ascertain what is true and what is not true; therefore, in the present case, the prima facie presumption is that the statements in the birth certificate are true, and they are prima facie evidence that Brookman is the first defendant's father. Ever since Roberts went into hospital, Mrs. Roberts had been living with Brookman and she was living with him at the date of the birth. Further, Brookman treated the first defendant as his child and left her the whole of his property, alluding to her by name in his will as his daughter. On the question of legitimation, the word "born" in s. 1 of the Legitimacy Act does not, at any rate primarily, mean "conceived." If it did, it would make it impossible to apply the statute, because a doctor cannot ascertain with exactitude at what date a child was conceived. The word "born" means what it says, namely, "brought into "a separate existence," unless it is for the child's benefit that it should mean "conceived," that is to say, "brought into being "en ventre sa mere:" *Villar* v. *Gilbey* (1). It cannot be for the first defendant's benefit, for it would have the result, among others, of making her a bastard for the rest of her life. The object of the Act is not to deal with adultery at all, but to take away from unfortunate persons the stigma of illegitimacy.

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(1) (1885) 11 A. C. 1.

(2) (1837) 5 Cl. & F. 163.

(3) [1926] Ch. 284.

Pascoe Hayward for those who were next of kin if the first defendant was not Brookman's legitimate child. There is a presumption, which has not been rebutted, that the first defendant is Roberts' daughter. The ordinary period of gestation accepted by the court is between two hundred and seventy-three and two hundred and eighty days: *Burnaby* v. *Baillie* (2). Assuming a normal period of gestation, the first defendant was conceived rather after the middle of November, 1919, at a time when Roberts was out of hospital. The court or jury to whom it is submitted that sexual intercourse between husband and wife did not take place must be so satisfied, not on a mere balance of probabilities, but on evidence which must exclude all reasonable doubt from their minds: *Morris* v. *Davies* (3). It is true that Brookman treated the first defendant as his own child, but that was to be expected in the circumstances. The evidence as to the marital relations of Mr. and Mrs. Roberts is wholly unsatisfactory. The evidence of Roberts' friend and son is inadmissible, being, in each case, merely an account of what Roberts himself said about the matter. As to legitimation, on the true construction of s. 1, sub-s. 2, of the Legitimacy Act, 1926, "born" means either "brought to birth," or "brought into being," i.e., en ventre sa mere, and, in law, it can have whichever of those two

(1) [1907] A. C. 139, 145.
(2) (1889) 42 Ch. D. 282, 296.
(3) 5 Cl. & F. 163, 215.

meanings the situation requires: *Elliott* v. *Joicey* (1). In the present case, it is being construed as appearing in a statute. It is therefore necessary to inquire into the reason or motive of the statute, and to give to the word "born" the fictional construction of meaning "en ventre sa mere" rather than the rational construction of meaning "brought to birth," if so to do will best carry out the intention of the legislature: Maxwell on the Interpretation of Statutes, 18th ed., p. 17, and the cases cited there. Here, the motive of the sub-section is to prevent adultery. That is why the word "born" must be construed as meaning en ventre sa mere, for, unless it is, that motive cannot be satisfied.

Stranders in reply. The first defendant was born after Roberts had died, and therefore the presumption of her being his legitimate daughter cannot arise. Even if it did arise it would be rebuttable, and, on the evidence, is rebutted. The rule in *Russell* v. *Russell* (2) does not apply here. It applies only when the effect of the evidence which it is intended to exclude would be to bastardize issue, not where evidence is directed, as it is here, to establishing which of two marriages is the one of which it is the issue. The evidence as to statements made by Roberts is therefore admissible. Further, the objection to it on the ground that it is hearsay evidence cannot be upheld. It is part of the res gestæ as showing the actual state of affairs, and is therefore properly admissible.

Cur. adv. vult.

July 11. COHEN J. read the following judgment: Prima facie, the first defendant became, from June 9, 1923, the legitimate daughter of Mr. and Mrs. Brookman. Mr. Pascoe Hayward, however, on behalf of those who will be the testatrix's next of kin if I decide against the first defendant, contends that she cannot be regarded as their legitimate daughter, first, because a presumption which has not been rebutted established that she is Mrs. Brookman's daughter by Roberts and, secondly, by reason of s. 1, sub-s. 2, of the Legitimacy Act, 1926. The first argument depends on the facts that Roberts died on December 18, 1919, and that the first defendant was born on August 20, 1920, while her mother was a widow. Assuming, as it is agreed that I ought to do in the absence of evidence to the contrary, that she was born

(1) [1935] A. C. 209.

(2) [1924] A. C. 687.

COHEN J.

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HEATH, *In re.*

after the normal period of gestation—as to the length of which, see *Burnaby* v. *Baillie* (1)—she was conceived between November 14 and November 21, 1919, while her mother was married to Roberts. Therefore, contends Mr. Pascoe Hayward, the presumption in favour of legitimacy makes her Roberts' legitimate daughter, and she cannot be the legitimate daughter of both him and Brookman. Against this argument, Mr. Stranders, for the first defendant, contends, first, that the presumption does not apply to posthumous children and, secondly, that it is rebuttable and is rebutted in this case. In my view, his first contention conflicts with the principle on which the rule that a father's or mother's declaration is inadmissible to bastardize the issue born after marriage is based—see per Lord Birkenhead L.C., citing *Goodright's case* (2) in *Russell* v. *Russell* (3)—but it avoids a difficult situation which might arise where a child was born within nine months after the first husband's death but after the widow's re-marriage. Unless Mr. Strander's contention is correct, the presumption of legitimacy would, in such a case, make the child the legitimate child of two fathers. I need not, however, decide whether the presumption applies, since I am satisfied that, if it does, I ought, on the facts, to find that it has been rebutted. In so concluding, I remember that, to quote Lord Cottenham L.C. in *Morris* v. *Davies* (4): " . . . . the court which is to be " satisfied that sexual intercourse did not take place, must be " so satisfied, not upon a mere balance of probabilities, but " upon evidence which must be such as to exclude all doubt, " that is, of course, all reasonable doubt in the minds of the " court or jury, to whom that question is submitted." In my opinion, no reasonable jury could fail to conclude that the daughter is the daughter of Brookman and not of Roberts. In the circumstances, I do not doubt that Roberts had not, at the material time, access to his wife in the sense in which that term was used in the judges' answer in the *Banbury Peerage case* (5), i.e., in the sense of sexual intercourse—see *Morris* v. *Davies* (4)—nor do I doubt that the daughter is the daughter of Mrs. Roberts and Brookman.

Several of the points which I have set out were treated as important in rebutting the presumption of legitimacy in *Morris* v. *Davies* (4). The headnote of that case, so far as material, is: "Held, that the presumption of law in favour of "the legitimacy of a child begotten and born of the wife "during the separation, may be rebutted, not only by evidence "to show that the husband had not sexual intercourse with "her, but also by evidence of their conduct, such as that "the wife was living in adultery"—as in the present case— "that she concealed the birth of the child from the husband, "and declared to him that she never had such child; that "the husband disclaimed all knowledge of the child and acted, "up to his death, as if no such child was in existence"—as is not so in the present case—"and also, that the wife's "paramour aided in concealing the child, reared and educated "it as his own, and left it all his property by his will." In the present case, Brookman appears to have reared and educated the child as his own, left her all his property by his will, and gone out of his way to make sure that she was registered as his child in the registry of births.

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(1) (1889) 42 Ch. D. 282, 296.

(2) (1777) 2 Cowp. 591, 592, 594.

(3) [1924] A. C. 687, 697.

(4) 5 Cl. & F. 163, 215.

(5) (1811) 1 S. & St. 153.

I have reached my conclusion on this part of the case without having regard to the statements to which Mr. Pascoe Hayward objected as hearsay. They are the statement of a son by a former marriage of Roberts and of a friend of Roberts. Mr. Stranders contended that these statements were admissible as part of the res gestæ. That may well be so, but I prefer to base my conclusion on evidence the admissibility of which was unchallenged.

Mr. Pascoe Hayward bases his contention that s. 1, sub-s. 2, of the Legitimacy Act, 1926, prevents the daughter from being treated as legitimated on three grounds. First, he contends that, although the phrase "was born" prima facie means "came into a separate existence," it can mean "was "conceived": *Elliott* v. *Joicey* (1). In that case the relevant part of the headnote is: "The effect of *Villar* v. *Gilbey* (2) "may be thus summarized:—Subject to any special context "in the document to be construed: 1. Words referring to "children or issue 'born' before or 'living' at, or 'surviving' "a particular point of time or event will not in their ordinary "or natural meaning include a child en ventre sa mere at the "relevant date. 2. The ordinary or natural meaning of the "words may be departed from, and a fictional construction "applied to them so as to include therein a child en ventre sa "mere at the relevant date and subsequently born alive if, "but only if, that fictional construction will secure to the child

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(1) [1935] A. C. 209.

(2) [1907] A. C. 139.

" a benefit to which it would have been entitled if it had been " actually born at the relevant date. 3. The only reason and " the only justification for applying such a fictional con- " struction is that where a person makes a gift to a class of " children or issue described as 'born' before or 'living' at " or 'surviving' a particular point of time or event, a child " en ventre sa mere must necessarily be within the reason and " motive of the gift."

Secondly, Mr. Pascoe Hayward contends that, in construing a statute, the court must have regard to the reason and motive of the statutory provision: see Maxwell on the Interpretation of Statutes, 8th ed., p. 17, and certain cases therein cited. One of the passages from Maxwell is: " . . . . it is another " elementary rule that a thing which is within the letter of " a statute will, generally, be construed as not within the " statute unless it be also within the real intention of the " legislature, and the words, if sufficiently flexible, must be " construed in the sense which, if less correct grammatically, " is more in harmony with that intention." The next passage which I cite from Maxwell is itself cited therein from the opinion of Lord Shaw in *Shannon Realties* v. *St. Michel* (*Ville de*) (1) and is: " Where alternative constructions are " equally open that alternative is to be chosen which will be " consistent with the smooth working of the system which the " statute purports to be regulating; and that alternative is to " be rejected which will introduce uncertainty, friction or " confusion into the working of the system." The next passage in Maxwell is: " Language is rarely so free from ambiguity " as to be incapable of being used in more than one sense, and " to adhere rigidly to its literal and primary meaning in all " cases would be to miss its real meaning in many." For all those reasons, contends Mr. Pascoe Hayward, I can have regard to the reason and motive of the statute. Further, he contends that the dominant motive of s. 1, sub-s. 2, of the Legitimacy Act, 1926, is to prevent adulterous conversation, and that that motive cannot be satisfied unless the court places the secondary meaning on the word " born " and treats it as including a child en ventre sa mere. I cannot accept that argument. The dominant motive of the Act, as distinct from that of the sub-section, is to remove the slur of bastardy where the parents have afterwards married. Parliament thought it desirable to limit the operation of the Act by s. 1,

(1) [1924] A. C. 185, 192.

sub-s. 2, but I agree with Mr. Stranders that I ought not to extend the operation of that limitation by giving to the words "was born" a strained secondary meaning which has been given to them only where it was required for the infant's benefit. To adopt that meaning in construing the Legitimacy Act, 1926, could only injure the infants concerned, and I can find no case where it has been adopted except to benefit an infant: see *Villar* v. *Gilbey* (1), where Lord Loreburn L.C. said: "I agree with Mr. Warmington that it may be difficult "at times to say when a particular construction is for the "benefit of a child. But I am not on that account to extend "to all cases a construction which has throughout been "applied only to a particular class. Authority may compel "us to do violence to the English language, and to say that "in some cases a child is born weeks or months before it is "brought forth. But in my opinion we ought not to say so, "knowing that it is not the fact, unless we are constrained "by authority. And we are not so constrained, except where "it is for the child's benefit. Inasmuch as the effect of "applying the rule of construction which I have been discussing to the present case would be to reduce the interest of "William Beaumaurice Rush from an estate tail to a life estate, "it would not be for his benefit, but obviously to his prejudice, "and the rule therefore has no application."

Were I to accept Mr. Pascoe Hayward's argument, the strange result would be that the daughter would be illegitimate although, had she been born in, for example, March, 1920, and had Mrs. Roberts married Mr. Brookman in February, 1920, she would have been the legitimate daughter of Mrs. Roberts and Brookman, notwithstanding that the possibility, if not the probability, of her being Roberts' daughter would have been far greater. Accordingly, I declare that the daughter is absolutely entitled on the testatrix's intestacy, I make a representation order, and I direct that the costs of all parties be taxed as between solicitor and client and paid out of the estate.

Solicitors: *Routh, Stacey, Hancock & Willis; Simon, Haynes, Barlas & Ireland.*

K. R. A. H.

END OF VOL. AND OF CHANCERY SERIES FOR 1945.

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(1) [1907] A. C. 139, 146.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1945, will be as follows :—

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In the Second Series,
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2. —— *Power to appoint fund "for such "person or persons living at the death of my "said son . . . . as my said son shall by "will or codicil appoint"—Validity. See In re* JONES, sub tit. SETTLEMENT
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2. —— *Estate duty — Marriage settlement —Income of trust fund settled by husband payable to wife for life to be expended in current household expenses—On wife's death income to settlor for life—Income used during joint lives by wife for personal expenditure—Interest "reserved . . . . by implication to the settlor" —Release or abandonment thereof—Death of settlor—Liability to estate duty—Finance Act,* 1894 (57 & 58 *Vict., c.* 30), *s.* 2, *sub-s.* 1 (*c*)—*Customs and Inland Revenue Act,* 1881 (44 *Vict., c.* 12), *s.* 38, *sub-s.* 2 (*c*).
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3. —— *Interest awarded in proceedings for recovery of debt—Income tax—Deduction—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D., para.* 1 (*b*); *All Schedules Rules, r.* 21—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 & 25 *Geo.* 5, *c.* 41), *s.* 3, *sub-s.* 1.
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4. —— *Succession duty — Marriage settlement—Attachment of duty—"Proper law of "the settlement"—Evidence of intention—Admissibility.*
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2. —— *Marriage settlement comprising shares in company—Proviso for accumulation of dividends after death of settlor—Issue of bonus shares—Conversion of share capital into stock—Original shares and bonus shares—Accretion.*
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3. —— Marriage settlement — Attachment of succession duty—"Proper law of the settlement"—Evidence of intention—Admissibility. *See* MARLBOROUGH (DUKE) *v.* ATTORNEY-GENERAL, sub tit. REVENUE.

4. —— Marriage settlement—Income of trust fund payable to wife for life for household expenses—Income to husband for life, if surviving—Capital to children on death of survivor—Income not used for household expenses during joint lives—Death of husband—Liability to estate duty—Finance Act, 1894 (57 & 58 Vict., c. 30), s. 2, sub-s. 1 (*c*). *See In re* COCHRANE, sub tit. REVENUE.

5. —— *Power of appointment — General power of appointment in default of issue—Special powers—Will—Devise of bequest of residuary estate—Property "over which I shall "then have power of appointment"—Inconsistency between terms of power and of will—Validity of exercise of special powers.*
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6. —— *Power of appointment—Power to appoint fund "for such person or persons "living at the death of my said son . . . . "as my said son shall by will or codicil "appoint"—Validity.*
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7. —— Referential trusts—Estate tail—Real estate settled by will on trusts of real estate in previous settlement—Base fee created before will and enlarged after death of testator—Accretion or independent settlements. *See In re* SHELTON'S SETTLED ESTATES, sub tit. WILL.

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8. —— *Will — Construction — Rule against perpetuities—Ultimate gift of capital void—Accruer to other shares on deaths of children without issue—Implication of cross remainders—Resulting trust of surplus income to testator's estate—Surplus income of settled fund asset but not income of testator's estate—Investment as capital.*
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2. —— *Public auction — Sale — Memorandum — Signature written before payment of deposit—Payment of deposit by cheque posted on following day—Auctioneer's authority to sell and contract—Purported withdrawal by vendor—Duration of auctioneer's authority—Law of Property Act*, 1925 (16 *Geo*. 5, *c*. 20), *s*. 40, *sub-s*. 1.
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3. —— *Annuity — Condition subsequent — Forfeiture clause — "Shall . . . . suffer any " . . . . process whereby the annuity shall "become payable to any other person"—Annuitant resident in France—Enemy occu-*

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pied territory—Payments to Custodian of Enemy Property—Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), *s.* 7.
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4. —— *Bequest of "stocks and shares ". . . . in care, custody or possession" of bank—Mandate to pay interest to account of testatrix at bank—Order in Lunacy—Transfer of stocks into court—Failure of bequest.*
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5. —— *Charitable bequest—" Such a sum as " will produce after payment of tax and all " other deductions the clear yearly sum of 60l." —Computation of capital sum to be set apart— Finance Act*, 1941 (4 & 5 *Geo.* 6, *c.* 30), *s.* 25, *sub-s.* 1.
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6. —— *Construction — Bequest of residue " to be divided equally between my nephew A " and the three children of my cousin abso- " lutely "—Mistake as to number of children— " Between "—Meaning.*
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8. —— *Construction—Specific devise of house—Pecuniary legacies — Appointment of " residuary legatee "—Residuary legatee entitled to undisposed of real estate.*
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9. —— *Construction — Power of appointment—Life interest in settled fund—" To any " wife who may survive him "—Appointment by deed in favour of wife—Subsequent divorce on wife's petition—Death of former husband.*
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